NO. 83-2003

JUN 6 1984
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In the Supreme Court of the United States

OCTOBER TERM, 1983

GRETCHEN HEMINGWAY
Administratrix of the Estate of
Glen R. Hemingway, Deceased,

PETITIONER

versus

OCHSNER CLINIC and/or
OCHSNER FOUNDATION HOSPITAL,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Was plaintiff, Glen R. Hemingway, denied his constitutional right to trial by jury due to the trial judge's granting a "remittitur" and alternatively a new trial on damages *only*; and limiting the time frame for said damages to thirty-six (36) specific days instead of the entire period of time during which plaintiff was injured and suffered damages which were presented to the jury.

II.

Was it truly a "remittitur" that was being ordered by the Court or was it actually a "judgment notwithstanding the verdict" (N.O.V.) when the trial judge remitted the $365,000 jury verdict to $15,000, limiting damages to a "specific thirty-six (36) day period", instead of the entire period of injuries and damages that were presented to the jury; and alternatively, offering the plaintiff a "new trial" on the issue of *damages only*, and limiting the "new trial" to thirty-six (36) specific days as determined by the trial judge.

III.

Whether the Fifth Circuit Court of Appeals, in their opinion in the case of "Glen R. Hemingway v. Ochsner Clinic and/or Ochsner Foundation Hospital, et al" dated January 16, 1984 at 722 F.2d 1220, is in direct conflict with the opinion of the same Fifth Circuit Court of Appeals in their opinion in the same case (tried five years earlier), "Glen R. Hemingway v. Ochsner Clinic and/or Ochsner Foundation Hospital, et al" dated December 27, 1979 at 608 F.2d 1040.

IV.

Whether there was sufficient evidence of damages, considering all of the evidence (rather than 36 specific days) to justify a verdict of $365,000 that the jury returned in favor of the plaintiff.

V.

Was it error on the part of the trial judge to substitute his own fact finding determination that damages should be limited to 36 specific days around the July, 1973 episode, in place of the jury's obvious determination that the plaintiff's damages started in May, 1973, which would include the surgical procedure known as a sympathectomy and the results, both physical and mental, therefrom.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GLEN R. HEMINGWAY
(GRETCHEN HEMINGWAY Substituted as
Plaintiff-Appellant for GLEN R. HEMINGWAY,
Deceased),

PETITIONER

versus

OCHSNER CLINIC and/or
OCHSNER FOUNDATION HOSPITAL,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

Glen R. Hemingway, (Gretchen Hemingway, substituted as plaintiff-appellant for Glen R. Hemingway, deceased), plaintiff in the United States District Court for the Eastern District of Louisiana and appellant and cross-appellee in the United States Court of Appeals for the Fifth Circuit, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on January 16, 1984, the Court having denied petitions for rehearing on February 17, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit captioned, "Glen R. Hemingway, plaintiff-appellant versus Ochsner Clinic and/or Ochsner Foundation Hospital, et al, defendants-appellees" bearing No. 77-2178 dated December 27, 1979, rehearing denied January 30, 1980. (Appendix, p. A-3, Document B)

The opinion of the United States District Court for the Eastern District of Louisiana, Memorandum Opinion and Order under caption, "Glen R. Hemingway versus Ochsner Clinic and/or Ochsner Foundation Hospital, et al" bearing Civil Action No. 74-1657-EJB. That opinion memorandum is dated April 5, 1982 and appears at Appendix, p. A-31, Document F.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported under the caption, "Glen R. Hemingway (Gretchen Hemingway, substituted as plaintiff-appellant for Glen R. Hemingway, deceased), plaintiff-appellant, cross-appellee versus Ochsner Clinic and/or Ochsner Foundation Hospital, defendant-appellee, cross-appellant" bearing No. 83-3051. That opinion is dated January 16, 1984 and appears at Appendix, p. A-51, Document J.

Petitions for rehearing and suggestion for rehearing en banc were denied on February 17, 1984 and appears at Appendix K, p. A-65, Document K.

JURISDICTION

The judgment of the District Court in the first trial was rendered on March 8, 1977.

The judgment of the Court of Appeals for the Fifth Circuit, in the first trial, was rendered on December 27, 1979; rehearing denied January 30, 1980.

The judgment of the District Court in the second complete trial was rendered on December 16, 1981.

After the remittitur was denied, the judgment on the new trial was rendered on December 20, 1982.

The judgment of the Court of Appeals for the Fifth Circuit, having been appealed from the second complete trial, refusal of the remittitur and appealing from the new trial thereon was rendered on January 16, 1984 and denial of rehearing was rendered on February 17, 1984.

Jurisdiction of this Court is invoked under Title 28, U.S.C. 1332, based upon diversity of citizenship and jurisdictional amount.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VII—Civil Trials

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This case has been in constant litigation for approximately ten (10) years now. The plaintiff, Glen R. Hemingway,

first filed his suit against Drs. Murison and Ochsner and their staffs, Ochsner Clinic and Ochsner Foundation Hospital and their respective insurance firms on June 14, 1974.

The case was first set for trial, and proceeded to trial on February 28, 1977 whereupon on March 1, 1977 at the conclusion of the plaintiff's evidence, the Court directed a verdict in favor of all defendants, thereby dismissing the case.

The plaintiff appealed the case to the United States Court of Appeals for the Fifth Circuit and on December 27, 1979, the Court of Appeals for the Fifth Circuit reversed the District Court and ordered that the case be remanded to be retried.

In September, 1981, trial once again reconvened, and during the testimony of the very last plaintiff's witness, the Court made some remarks to the witness in front of the jury that we felt were prejudicial. The jury was excused, counsel for plaintiff asked the Court for some corrective instruction to the jury to remedy the problem. The Court refused to give any such instruction, which left the plaintiff with no alternative but to move for a mistrial, which we did. The Court immediately granted the motion for mistrial and the trial was aborted.

This case was reset for trial in early December, 1981 and this time was tried to its conclusion. The jury returned with a verdict in favor of the plaintiff in the amount of $365,000.00.

The Court denied defendants' motion for directed verdict and entered judgment on the jury verdict against

Ochsner Clinic and Ochsner Foundation Hospital in the sum of $365,000.00.

The Court then entertained post-trial motions filed by defendants asking for (1) judgment notwithstanding the verdict and alternatively, (2) for a new trial. On April 5, 1982, the Court denied defendants' motion for a judgment notwithstanding the verdict and also denied defendants' motion for a new trial on the issue of liability. The Court stated that, "The verdict of the jury on the issue of damages only in favor of the plaintiff and the judgment entered thereon on December 10, 1981 be set aside and a new trial allowed on the issue of damages only unless within twenty days of the date of entry of this order the plaintiff files in the the record of these proceedings a remittitur of that amount of the aforesaid jury award and judgment in excess of $15,00.00." The Court, at that time, issued a Memorandum Opinion and Order stating the basis of the Court's rulings. This appears in Appendix, p. A-31, Document F. In this memorandum of reasons, the Court stated that in the new trial, the plaintiff would be allowed to present evidence of damages only from July 9, 1973 until mid-August, 1973.

The plaintiff asked that the question be certified to the Court of Appeals for the Fifth Circuit, which request was denied by the Court. This appears at Appendix, p. A-45, Document G.

During this time, Judge Boyle, who was previously the District Court judge, took senior status. Judge McNamara was appointed to the bench and took over the case. Judge McNamara held a conference in December, 1982 whereupon all parties were notified that the new trial would be limited to damages sustained by the plaintiff

between July 9, 1973 and mid-August, 1973 in accord with the opinion rendered by Judge Boyle.

Thereupon, all parties agreed that since the matter had been tried three times previously and since obviously it was a matter that would be appealed, that we simply submit the matter to the Court based upon the prior transcripts and the Court would issue a judgment in direct accord with the opinion previously written by Judge Boyle and then we could all take the matter to the Court of Appeals. (Appendix, p. A-47, Document H)

Accordingly, on December 20, 1982, Judge McNamara issued a judgment in favor of the plaintiff in the amount of $15,000.00, stating in that judgment that, "The damages herein awarded are limited to the damages sustained by the plaintiff between July 9, 1973 and mid-August, 1973 as per the findings of Judge Edward J. Boyle, Sr. in the order dated April 5, 1982". Appendix, p. A-49, Document I.

Plaintiff filed post-trial motions, all of which were denied. Whereupon plaintiff then appealed both judgments of the Court of Appeals for the Fifth Circuit. On January 16, 1984, the Court of Appeals affirmed the lower court in their opinion which is attached hereto in Appendix, p. A-51, Document J.

It is from this second appeal and the opinion of the Court of Appeals for the Fifth Circuit which is in direct conflict with the Court of Appeals for the Fifth Circuit's previous opinion of December 27, 1979 and the fact that the plaintiff herein was denied his Seventh Amendment Constitutional right to a trial by jury that we now ask this Honorable Court for relief.

ARGUMENT

It was error for the District Court to enter the order of April 5, 1982, granting a remittitur reducing the jury verdict and judgment of December 16, 1981, in the amount of $365,000.00 to $15,000.00 and for the Court of Appeals for the Fifth Circuit to affirm; further it was error for the District Court to order that the subsequent new trial, after plaintiff's refusal to accept the Court's remittitur, to limit plaintiff's presentation of damages to some thirty-six days and for the Court of Appeals for the Fifth Circuit to affirm it.

Plaintiff submits that he proved substantial damages to the jury and that their award was not excessive. In granting the defendants' motion for a new trial on the issue of damages alone, the Court referred to the case of *United States v. Bucon Construction Company,* 430 F.2d 420, 423 (5th Cir. 1970) for a standard which governs the granting of a motion for a new trial. There the District Court stated that "a motion for a new trial is addressed to the sound discretion of the Court which may set aside the verdict if it is contrary to the *preponderance* of the evidence, although a judgment N.O.V. is not justified or if, for other reasons, it will result in a miscarriage of justice". (Emphasis supplied)

Plaintiff submits that the District Court, in granting the defendants' motion for a new trial on damages, isolated its consideration to only one period of time when plaintiff was being treated by the defendants. At page 9 of the Court's April 5, 1982 Memorandum Opinion and Order, the Court stated as follows:

"The jury's determination of damages, however,

> is not supported by a preponderance of the evidence. The jury's award of $365,000.00 is shockingly excessive and was made although any alleged ill effects from the July 9th administration of Cafergot had dissipated by mid-August. Plaintiff has made no claim of 'Cafergot damage' resulting from Cafergot administered to him on any other occasion by doctors at Ochsner Clinic or Ochsner Foundation Hospital."

In making this determination, the Court disregarded other evidence of damages suffered by the plaintiff during his course of treatment by the defendants. Plaintiff would point out to the Court allegation fourteen in his original complaint (Record 10) wherein plaintiff alleged the following:

> "The defendants, their agents, servants, and employees, acting together and within the course and scope of their employment, were careless and negligent in the following respects, among others: (A) They failed to use reasonable and due care and skill in prescribing medication for petitioner's illness; (B) They failed to use reasonable and due care and skill in ascertaining the contraindications of the drug which they prescribed for the petitioner; (C) They failed to use reasonable and due care in prescribing treatment for petitioner's foot and they failed to tell the petitioner to return in sufficient time to receive additional treatment, so that when he did finally return, surgery was necessary in order to save his leg; (D) They negligently and carelessly cut a healthy nerve, rendering the petitioner sterile for the rest of his life; (E) They negligently and carelessly failed to properly diagnose and treat petitioner for the condition which he suffered when he first went to the emergency room on June 10, 1973; (F) Petitioner further pleads res ipsa loquitur insofar as the

surgical sympathectomy is concerned; (G) They failed to read the proper orders on hospital charts and negligently administered a drug which was contraindicated to the petitioner, causing him additional injury; (H) They failed to exercise care and skill requisite under the circumstances; (I) They did not fully disclose to the petitioner, one, the precise nature of the contemplated procedure; two, the risk involved in the procedure; three, the prospects of success or failure of the procedure; and four, alternate procedures."

In addition to these allegations, plaintiff would point out to the Court the pre-trial order filed prior to the third trial of this case (Record 576), wherein plaintiff made the following allegations of negligence and Cafergot damage at paragraph 6(a) of the pre-trial order, to-wit:

"The plaintiff contends that during the period between May, 1973 and July, 1973, while under the care of defendants, Dr. Paul J. Murison, Dr. John J. Ochsner, Dr. W. H. Mosely, Ochsner Clinic and/or Ochsner Foundation Hospital, its agents, employees, residents and administrators, that these defendants negligently and improperly and/or deviated from standards of medical practice, authorized and acknowledged drugs and medications to the plaintiff in the form of a suppository known as Cafergot, which caused damage to plaintiff in the following respects, to-wit: Damage to the vessels and arteries in the plaintiff's lower extremities, primarily the left leg. This damage being to the nerve, tissues, and circulatory system. Additionally, causing gangrene of the left foot and causing plaintiff to be scheduled for amputation or part amputation of the left leg. Further, causing doctors at Ochsner, including defendants herein, to perform a sympathectomy to plaintiff, which operation

> resulted in plaintiff's inability to perform sexually and additionally causing pain and a condition known as retroejaculation. Additionally, plaintiff went through, in the past, mental anguish having been told on two occasions of amputation of his left leg, and plaintiff continues, as did in the past, to suffer mental anguish and loss of sexual capacities."

Further, in counsel for plaintiff's opening statement, he outlined plaintiff's contentions that the surgical procedure performed on plaintiff known as a sympathectomy was caused by the failure of doctors at Ochsner to properly ascertain the medications that the plaintiff was taking at the time. Plaintiff submits that had the doctors who treated plaintiff in the emergency room in June of 1973 ascertained that the problems he was having was due to the Cafergot that had been prescribed to him by other doctors at Ochsner, the sympathectomy would have been unnecessary. Plaintiff submits that the damage done to his body by the sympathectomy is irreversible. The nerves cut by Dr. Ochsner control circulatory processes in the lower left leg. Throughout these proceedings, as stated by counsel for plaintiff in his opening statement (see trial record volume 6, page 12 through page 15), plaintiff was contending he was seeking damages because he felt the sympathectomy performed by Dr. Ochsner was thought to be necessary because of a condition caused by the prescription of a vascular-constricting medication. Obviously, this goes beyond the scope of the limitation set forth by Judge Boyle in his Memorandum Opinion and Order. It should be specifically noted that the plaintiff had been improperly treated since May of 1973 and that the sympathectomy was performed on June 17, 1973 which was clearly before the July 9 - mid-August, 1973 period to which the Court

limited its remitted award. It is clear that plaintiff put on sufficient evidence to justify a verdict of $365,000.00, considering the events which took place when he came into Ochsner in June of 1973.

Plaintiff suggests that the standard used by the District Court in granting the new trial on the issue of damages alone was the proper standard. In its Opinion at page 8, the District Court stated, "A motion for a new trial is addressed to the sound discretion of the Court which may set aside the verdict if it is contrary to the preponderance of the evidence..." Plaintiff submits the proper standard is set forth in *Spurlin v. General Motors Corporation*, 528 F.2d 612, 620 (5th Cir. 1976). There the Court stated:

> "The standard adopted by this Court is that the District Court should not grant a new trial motion unless the jury verdict is 'at least...against the *great* weight of evidence'. *City Service Oil Company v. Launey*, [403 F.2d 537, 540 (5th Cir. 1968)] (Emphasis in the original.) A rule which would permit a court to grant a new trial when the verdict was merely against the 'greater weight' of evidence, this Court said, 'would destroy the role of the jury as the principal trier of the facts, and would enable the trial judge to disregard the jury's verdict at will.' " *Id.*

Regarding the granting of new trials due to supposed excessive damage award, plaintiff would refer the Court to *Narcisse v. Illinois Central Gulf Railway Company*, 620 F.2d 544 (5th Cir. 1980). There, the district court granted a new trial because of an alleged excessive damage award. A second trial resulted in a much lower verdict for the plaintiff, and he appealed, contending that the district

court abused its discretion in ordering a new trial. The Court of Appeals held that the first jury's verdict for the plaintiff in the sum of $175,000.00 was clearly within the universe of possible awards which are supported by the evidence, and, therefore, the district court erred in granting the defendant's motion for a new trial. Plaintiff submits that this case presents a similar situation. However, in this case, the District Court, in granting the defendants' motion for a new trial on the issue of damages alone, went one step further and ordered that in any new trial plaintiff would be limited in his presentation of damages to the jury. Clearly, what the District Court did was grant the defendants' motion for a judgment notwithstanding the verdict regarding the obvious jury award for all of plaintiff's damages which were related to Cafergot. Plaintiff disagrees that a jury award of $365,000.00 for thirty-six days of pain and suffering might be excessive. However, plaintiff submits that the evidence supports the award because the jury believed that the sympathectomy was caused by the prescription of Cafergot and that this surgical invasion of the plaintiff's body was unnecessary, but for the negligent administration of the drug to the plaintiff. Accordingly, plaintiff submits that the damage award in the present case was "clearly within the universe of possible awards which are supported by the evidence". *Bonura v. Sealand Service, Inc.*, 505 F.2d 665, 670 (5th Cir. 1974) (Emphasis in original quotes.)

In addition, the Court, in its Memorandum Opinion and Order, disregarded the testimony regarding the scheduled amputation of plaintiff's leg. Both the plaintiff and his wife testified extensively regarding the sequence of events between June and July, 1973 (see trial transcript volume 10). Both plaintiff and his wife testified that they were notified by the defendants that plaintiff's leg was

scheduled to be amputated. Although Dr. Ochsner denied that any amputation was ever scheduled, plaintiff submits that this was simply a matter of credibility. The District Court chose to believe Dr. Ochsner's version that no amputation was ever scheduled. However, plaintiff submits that the credibility of witnesses is for the jury to determine, and obviously, the jury believed the plaintiff, his wife, and his mother. Plaintiff submits the proper rule is that courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. *Tennant v. Peoria and Pekin Union Railway Company*, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944). Moreover, it is the function of the jury as the traditional finder of the facts, and not the court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses. *Boeing Company v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (En Banc).

Plaintiff submits that in reducing the jury award to $15,000.00 or alternatively ordering a new trial on damages alone limited to that period between July 9 and mid-August, 1973 effectively amounted to a judgment notwithstanding the verdict. In the first appeal of this case, the Court of Appeals for the Fifth Circuit already reversed the District Court for granting a directed verdict at the first trial. Plaintiff submits that some of the language in the Court's Opinion then is very pertinent to the issues herein, to-wit:

> "As shown by our recitation of the facts, the defendant doctors clearly established the community standard touching upon the prescribing of medication that constricted the blood vessels

at a time when the jury could infer that the defendants had knowledge that the patient was suffering from a disease evidenced by two greatly constricted blood vessels. This is clear from the testimony, quoted above, to the effect that the community standard was that a physician would not, except under exceptional circumstances, administer a drug when it was contraindicated by a disease from which the patient was suffering. Here, it is clear that the jury could infer that there was ample knowledge on the part of the appropriate persons in both hospital and clinic that Hemingway was threatened by, and actually suffering from, peripheral vascular insufficiency, which Dr. Murison testified would amount to 'peripheral vascular disease'. *The jury could also infer that at the time the sympathectomy was performed by Dr. Ochsner that the procedure was thought to be required because of a condition caused by prescription by other doctors of a vascular-constricting medication.* Moreover, the jury could, of course, have believed the testimony of mother and wife of the plaintiff who testified that on an occasion before the last Cafergot was prescribed for Hemingway, the surgeon had stated to them that the patient was suffering from Buerger's disease, which was clearly a contraindication for the use of such medication." (Emphasis supplied.) *Glen Hemingway v. Ochsner Clinic,* 608 F.2d 1040, 1048 through 1049 (5th Cir. 1979).

Moreover, plaintiff submits that the testimony of Dr. Ochsner supported his position that the cause of the sympathectomy (performed on June 17, 1973) was due to the prescription of Cafergot. Plaintiff refers the Court to the testimony of Dr. Ochsner in volume 8 of the trial transcript, wherein Dr. Ochsner seems to have changed his opinion as to whether or not plaintiff was suffering from

hypersensitivity to Cafergot in June of 1973. Specifically, plaintiff refers the Court to page 56, line 24 through page 67, line 1. Regarding plaintiff's other damages, both the plaintiff and his wife testified when the plaintiff sits or stands for more than an hour to an hour and a half, his foot swells and he is unable to move very well. Sometimes the plaintiff's leg swells so badly, one cannot see his ankle. Sometimes the plaintiff's leg will go into spasms at night, and the plaintiff wakes up screaming, and he has to place himself in a bathtub to cut the spasms down. Whenever plaintiff has to stand for long periods, he has pain in his leg, and he becomes dizzy. Plaintiff constantly has to sleep with pillows under his leg to keep it high in order to keep the swelling down, and because of the pain he can only sleep intermittently. In addition, both the plaintiff and his wife testified that, because of the intense pain in his leg, they have no sexual relationship and that plaintiff is unable to work. It should be noted that, in the hospital record, there is a note by Dr. Murison prior to the Cafergot episodes and the sympathectomy that, notwithstanding the plaintiff's pancreatectomy, splenectomy and chloecystectomy, it was expected plaintiff "should be able to return to work soon". The plaintiff also testified that the muscles in his leg do not work; he has shooting pains like electricity; the he has much cramping in his leg; he can no longer run; that he has constant swelling and trouble with infections. Plaintiff also testified that the medications he takes for the swelling in his leg caused an increase in his bladder activity which prevents him from sleeping any long period of time. See generally, plaintiff's testimony volume 10, page 74 through 139. Plaintiff submits there was an abundance of evidence from which the jury could justifiably award plaintiff $365,000.00. The plaintiff submits that the ordeal suffered by him in the months of June and July 1973 alone would justify such an award, considering the episodes of arterial

shutdown, the sympathectomy, the contemplated amputation of his leg, and the continuous pain suffered by the plaintiff. The plaintiff testified that, ever since the various bouts of arterial shutdown due to Cafergot and the sympathectomy, he has encountered an extraordinary amount of problems with his left leg as set forth above. While the defendant might contend there is no medical testimony that any action on the part of the defendant's staff doctors caused the plaintiff's problems, clearly this is not the case. It is clear from the testimony at the trial, that on various occasions Cafergot completely shut down the blood supply to plaintiff's left leg and foot. All of the doctors were in agreement that the lack of blood supply to the foot would ultimately cause the tissues to die and result in amputation. In addition, Dr. Ochsner testified that the sympathectomy which he performed cut the sympathetic nerve fibers which innervate the muscles which surround the blood vessels in the leg which aid in proper circulation. When the sympathetic nerve fibers were cut, these muscles became permanently relaxed in the plaintiff thus taking away any benefit plaintiff's circulatory system might receive when the sympathetic nerve fibers are intact. Clearly, the jury could have viewed this favorably to the plaintiff, and the jury could have properly found that the sympathectomy resulted from the administration of the drug Cafergot and inferred that the operation would have been unnecessary had the staff of Ochsner Clinic and Oschner Foundation Hospital properly communicated to Dr. Ochsner that plaintiff had been taking Cafergot, a vasoconstrictant, at least since January of 1973 and that this was a reaction to this drug and that, by discontinuing use of the drug, plaintiff would have recovered without the necessity of the sympathectomy. As previously stated, ever since the bouts with Cafergot and the sympathectomy, plaintiff has many problems with his leg, with swelling, dizziness, spasms, and

constant pain. In addition, although the Ochsner medical records note that, prior to the bouts with Cafergot and the sympathectomy, Dr. Murison anticipated that plaintiff would be able to return to his former occupation as a telephone installer, he has been unable to work since that time. In addition, both plaintiff and his wife testified that, because of the severe pain plaintiff has in his leg, it has been difficult and then impossible for them to enjoy a normal husband and wife relationship. Plaintiff would refer the Court to the case of *Great American Indemnity Company v. Holloway*, 286 F.2d 106 (5th Cir. 1960), wherein the Fifth Circuit quoted from the Supreme Court regarding the rule of testimony of medical experts, to-wit:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evidence so shortly after the accident, was, in fact, caused by that accident, was not impaired by the failure of any medical witness to testify that it was, in fact, the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony, into consideration. See *Sullivan v. Boston Elevated R. Co.*, 185 Mass. 602, 71 N.E. 90; *Miami Coal Co. v. Luce*, 76 Ind.App. 245, 131 N.E. 824. Though this case involves a medical issue, it is not exception to the adminition that, 'It is not the function of a court to search the record for conflicting circumstantial

> evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury******. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because the judges feel that other results are more reasonable. *Tennant v. Peoria and Pekin Union Railway Company,* 321 U.S. 29, 35 [64 S.Ct. 409, 88 L.Ed. 520]. The proofs here justified with reason the conclusion of the jury that the accident caused the petitioner's serious subsequent illness. See *Rogers v. Missouri Pacific Railway Company,* 352 U.S. 500 [77 S.Ct. 433, 1 L.Ed.2d 493]." *Sentilles v. Inter-Caribbean Corporation,* 1959, 361 U.S. 107, 109-110, 80 S.Ct. 173, 175, 4 L.Ed.2d 142.

Accordingly, plaintiff submits it is clear that the testimony of he and his wife was sufficient to prove legal causation. Moreover, viewing all the testimony in the light most favorable to the plaintiff, it is clear that the Cafergot and the sympathectomy caused the problems from which the plaintiff suffered and continues to suffer for the rest of his life.

As previously stated by plaintiff in this brief, the jury award of $365,000.00 is clearly within the universe of possible awards supported by the evidence. Plaintiff submits that the jury in this case heard all of the evidence and was instructed by the Court as to the applicable law. As previously stated by the Fifth Circuit, it should always be presumed that the jury found the facts correctly, and having done so, it would consider the Court's instructions concerning the applicable law and return a verdict consistent

with those facts and instructions. *L'Urdaine Et La Seine v. Rodriguez*, 258 F.2d 1 (5th Cir. 1959); *Little v. Green*, 429 F.2d 1061 (5th Cir. 1970) *cert. denied* 400 U.S. 964, 91 S.Ct. 366 (1971). This is precisely what the jury did in this case and returned its verdict in favor of plaintiff after hearing all of the evidence as to negligence, causation and damages.

It should be noted that the trial court heard the plaintiff's evidence on three separate occasions, and having done so, prepared an appropriate jury instruction which included an instruction on damages (Appendix C, p. A-25, Document C) wherein the Court instructed the jury concerning damages past and future. We can only conclude from this that having heard plaintiff's evidence on three separate trial occasions, the Court must have felt that there was some basis for giving such a jury instruction. The Court at no time limited the jury to approximately 36 days from July 9, 1973 to mid-August.

Accordingly, from the evidence presented by plaintiff and the jury instruction by the Court, the jury was properly within its rights to consider all damages from May, 1973 up until the time of trial and on into the future. For the District Court to then take away the jury verdict and limit the period of damages in a "new trial" is nothing less than substituting the Court's verdict for that of the jury, which is clearly under the law a judgment notwithstanding the verdict. To do this takes away plaintiff's Seventh Amendment Constitutional right to trial by jury.

Additionally, it should be noted that when the trial court directed a verdict in the first trial (1977) and the Court of Appeals for the Fifth Circuit reversed ordering that there was substantial evidence to allow plaintiff his Seventh Amendment right to trial by jury; and when the

trial court, after the second complete trial (1981) ordered a remittitur and/or a new trial limiting the period of damages to some 36 days, this was once again taking away the plaintiff's Seventh Amendment right to a trial by jury. When this matter was taken to the Fifth Circuit Court of Appeals for a second time, the Fifth Circuit Court of Appeals was put in the position of following its 1979 opinion and reversing the trial court or affirming the trial court thereby reversing themselves by issuing a conflicting opinion in 1984.

We respectfully submit that the evidence presented in the last trial was precisely the same as the evidence presented in the first trial; yet, the Fifth Circuit Court of Appeals sought to reverse the trial judge in the first instance, and sought to affirm the trial court in the second instance (thereby reversing their original position and causing a direct conflict within themselves).

CONCLUSION

Finally, and in conclusion, we respectfully submit that for the District Court to direct a verdict against this plaintiff in 1977, and then to have the Fifth Circuit Court of Appeals state very succinctly that there was an abundance of evidence in favor of plaintiff's case and that it should be submitted to the jury; then for the case to be retried in 1981 and a verdict of $365,000.00 rendered on the basis of that evidence and on the law that the Court submitted to the jury in its jury instructions, based upon the evidence that was presented in the case (a copy of which pertinent part of the jury instructions as to damages appears at Appendix, p. A-25, Document C) and then to take away that jury award and order that the award be remitted to $15,000.00 or alternatively order that the case be tried again only on the issue of damages and only for damages

from July 9, 1973 until mid-August, 1973 is not ordering a new trial, but is rather a judgment notwithstanding the verdict. By the trial court issuing this judgment notwithstanding the verdict, the trial court substituted its own verdict in place of the verdict rendered by the jury, thereby virtually taking away from this plaintiff, for a second time since 1977, his right to trial by jury.

The Fifth Circuit Court of Appeals in 1979 told the trial court that he was in error by directing the verdict and gave their reasons therefor. In the 1981 trial, the judge denied all of the defendants' motions for directed verdict. The Court, having heard all of the evidence, instructed the jury on the issue of damages, both past and future, and then submitted the matter to the jury. After the jury returned with their verdict, the Court then virtually "threw out" that verdict and instated its own verdict in place of the jury verdict. The Court further ordered that if the plaintiff did not accept its $15,000.00 award (remittitur), then it further threw out the jury verdict by ordering a new trial limited to some 34 to 36 days, namely July 9, 1973 until mid-August, 1973.

It is clear that the net effect of what the Court did in this last trial in 1981 was to take away the plaintiff's right to trial by jury which is afforded him by the Seventh Amendment to the Constitution of the United States, and to instate the Court's own verdict in place of the verdict of the jury to which this plaintiff is clearly entitled.

Respectfully submitted,

_____

DARRYL J. TSCHIRN

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Brief this the 5th day of June, 1984 by placing it in the United States Postal Service postage prepaid to:

Mr. Henry B. Alsobrook, Jr.
ADAMS AND REESE
4500 One Shell Square
New Orleans, LA 70139

DARRYL J. TSCHIRN

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NO. 74-1657
CIVIL ACTION
SECTION "D"

GLEN R. HEMINGWAY

VERSUS

OCHSNER CLINIC AND/OR
OCHSNER FOUNDATION HOSPITAL,
DR. JOHN OCHSNER,
DR. PAUL J. MURISON,
DR. W. H. MOSBY,
ARGONAUT SOUTHWEST INS. CO.

JUDGMENT

This matter came on for jury trial before the Court on February 28, 1977 and March 1, 1977. The Court having granted motion of defendants, Ochsner Clinic and/or Ochsner Foundation Hospital, Dr. John Ochsner and Dr. Paul J. Murison, for directed verdict at the close of plaintiff's evidence, and considering that the defendants, Dr. W. H. Mosby and Argonaut Southwest Ins. Co., had been heretofore voluntarily dismissed by plaintiff;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Ochsner Clinic and/or Ochsner Foundation Hospital, Dr. John Ochsner and Dr. Paul J. Murison, and against plaintiff, Glen R. Hemingway, dismissing plaintiff's suit with costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that intervention of Steven R. Plotkin be, and it is hereby, DISMISSED for mootness.

New Orleans, Louisiana, this 8th day of March, 1977.

/S/ Signed
NELSON B. JONES, CLERK

Approved as to form:

/S/ Signed
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

Glen R. HEMINGWAY,

Plaintiff-Appellant,

v.

OCHSNER CLINIC and/or Ochsner Foundation Hospital et al.,

Defendants-Appellees.

No. 77-2178.

United States Court of Appeals,
Fifth Circuit.

Dec. 27, 1979.

Rehearing Denied Jan. 30, 1980.

In malpractice action against doctors, hospital and clinic with which they were associated, and their respective insurance carriers, the United States District Court for the Eastern District of Louisiana at New Orleans, Edward J. Boyle, Sr., J., directed verdict for defendants, and plaintiff appealed. The Court of Appeals, Tuttle, Circuit Judge, held that: (1) plaintiff was not precluded from recovering against doctors on ground that there was no positive, affirmative evidence as to the abstract standard of the profession in the locality, produced independently by plaintiff, together with testimony at trial of a qualified physician that defendants failed to measure up to such standard, where defendant doctors themselves, called on behalf of plaintiff sufficiently established the standard of care, and record disclosed sufficient objective evidence from which

jury could find that such standard was not complied with; (2) proof in hospital and clinic records from which jury could infer that at the time patient was being treated for lack of blood supply to his left foot, he was given medication with further constricted the blood supply generally was sufficient from which jury could have inferred negligent conduct on the part of such defendants; and (3) under Louisiana law, plaintiff is not required to prove either the existence of or the content of a "community standard" to esstablish liability of hospital or clinic.

Reversed and remanded.

Darryl J. Tschirn, John M. Robin, Covington, La., for plaintiff-appellant.

Henry Alsobrook, Jr., Gregory J. Laborde, New Orleans, La., for defendants-appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana.

Before TUTTLE, GOLDBERG and RANDALL, Circuit Judges.

TUTTLE, Circuit Judge:

The appellant here challenges the correctness of the trial court's order directing a verdict for the appellees, several doctors, the hospital and clinic with which they were associated and their respective insurance carriers. The trial court based its decision on the failure of the plaintiff to produce evidence "as to the standard of care generally practiced by other physicians in this community or in

the community in which these defendant physicians practice in similar situations," and on the further ground that "there has been no evidence offered by the plaintiff tending to show that the defendant doctors negligently failed to follow such a standard." The court then determined that in the absence of adequate evidence to establish a claim against the doctors, the hospital and clinic with which they were associated could not be found negligent on the record before it.

Because we find that the defendant doctors themselves, called on behalf of the plaintiff, sufficiently established the standard of care applicable to the conduct which the plaintiff challenges in his action, and that the record discloses sufficient objective evidence from which a jury could find that such standard was not complied with, we reverse.

The plaintiff's action was based on his contention, to use laymen's language, that at a time when he was being treated for serious arterial insufficiency in his left foot the defendant doctors or other doctors and hospital personnel administrated a drug which was designed to reduce or cut down the blood supply to all parts of his body. He claims that both the literature concerning the drug used and the pharmacopoeia warned against use in such circumstances, and the doctors' statement that "the standard in this community" is "that normally you don't prescribe a drug to someone who has a condition which is a contraindication" met all of the requirements for submission of the case to the jury.

I. FACTUAL BACKGROUND

The evidence which we find was sufficient to withstand a directed verdict was produced entirely from examination and cross-examination of the defendant doctors and from the hospital and clinic records. Briefly, it will be outlined

as follows: Hemingway entered the Ochsner Clinic on January 1, 1973, having been referred by the Veterans Administration. He came under the care of Dr. William Davis and Dr. McKinnon for gastrointestinal disorders. He was subjected to the usual tests and was found to be suffering from a disease of the pancreas. On January 25, Dr. McKinnon performed an 95% pancreatectomy, cholecystectomy, and splenectomy. Because plaintiff continued to suffer symptoms of pancreatitis, on April 12, 1973, Dr. McKinnon performed further complete pancreatectomy. One of the side effects of these operations is that the patient becomes a diabetic, suffering from diabetes mellitus.

After the operation, Hemingway began outpatient treatment under the care of Dr. Paul Murison, an Ochsner Foundation endocrinologist for the treatment of his diabetes mellitus. He was first seen by Dr. Murison in February 1973. Dr. Murison was asked "whether or not diabetes had anything to do with vascular disease," "does one relate to the other?" He said "diabetics are more prone to develop problems with vascular." Then the further question; "more prone than ...?;" He stated "an average person." Subsequently, during further questioning he qualified his answer by stating "certain time levels. Early in diabetes the disease is not a major problem, but after many years it becomes an increasingly important problem." Dr. Murison also testified that while in the hospital on January 3, some 20 days before the first operation, Hemingway had complained of a migraine headache and had been given a Cafergot suppository and that at that time he had shown no adverse reaction to this dosage. It was undisputed that Cafergot contains the pharmacological properties of ergotamine which is used for the purpose of constricting blood vessels. Prolonged or excessive administration of the ergot alkaloids can cause

vascular insufficiency and gangrene of the extremities. The literature which accompanies Cafergot and the pharmacy textbook introduced in evidence state that Cafergot is contraindicated for patients when suffering from certain types of vascular disease.[1]

Dr. Murison testified as to the meaning of the words "peripheral vascular disease" as follows:

> Q: Would you explain to them what peripheral vascular disease is.
>
> A: First of all, before we get to the symptoms, peripheral vascular diseases are a group of diseases in which there are problems dealing with the circulation in the extremities, the peripheral areas of the hands and the feet.
>
> Q: By peripheral, you mean the hands or the feet, is that right, the ends of the extremities, is that right?
>
> A: Yes.
>
> Q: What do you say with regard to those, the vascular disease?

---

[1] Under the heading "Contraindications" the literature accompanying the medicine states: "Peripheral vascular disease, coronary heart disease, hypertension, impaired hepatic or renal function, sepsis and pregnancy."

The textbook states under the heading "Contraindications:" Because gangrene due to ergotamine has occurred in a number of patients with infection, sepsis is a definite counterindication. It should not be used in patients with vascular disease, such as syphlitic arthritis, marked arteriosclerosis, coronary artery disease, thrombophlebitis, and Raynaud's or Buerger's syndrome...."

A: That is what peripheral vascular disease is. You asked me—

Q: I am sorry, I just want to hear the first part of your answer again. I didn't catch it.

THE WITNESS:

Would you give me the answer?

(The court reporter read the answer.)

BY MR. TSCHIRN:

Q: Dealing with circulation in the peripherial areas, would that be a layman's way of saying it?

A: Yes.

Q: So, dealing with circulation in hands or feet, is that correct?

A: Yes.

Q: That is what peripheral vascular disease is?

THE COURT:

How many times are you going over that, Counsel? That is four times, now.

BY MR. TSCHIRN:

Q: Is that correct, sir?

A: Yes.

Following this testimony, the medical witness testified that physicians originally obtain familiarity with the

administration and prescribing of drugs in medical school and by keeping in constant awareness "through the medical literature, through meetings." The identified text "Pharmacological Basis of Therapeutics" is one of the textbooks with which he said he was familiar. The following evidence was then introduced:

> Q: The drug Cafergot: First of all, let me ask you this. Do doctors or should doctors normally deviate or change from what the pharmacy textbooks tell them what to do as far as prescribing drugs?
>
> Should a doctor on his own just change from that?
>
> A: It should not be done unless there are very compelling reasons why it might be necessary or needed.
>
> Q: So, the answer, first of all, it should not be done, is that correct?
>
> A: That covers too much. There are certain rare instances in which you may deviate from for the good of the patient, from the restrictions that are put upon.
>
> Q: Now is that pretty much the standard in this community, that physicians should adhere, as far as prescribing and the administration of drugs—adhere to what the pharmacy textbooks tell them to do?
>
> A: They should be acquainted with what the pharmacy textbooks say and should follow that as closely as the patient's special condition warrants.

Q: So, that is the standard, then, is that correct?

A: Yes.

Q: And is it correct, sir, that the doctors should not deviate from that unless there is such special circumstances that the doctor feels is compelling to deviate from it?

A: Yes.

Thereafter, in response to the question: "Isn't it a fact that normally you don't prescribe a drug to someone who has a condition which is a contraindication" the witness answered: "True" and to the question: "And that is a standard in this community, isn't that right?" the doctor answered: "Yes."

Towards the end of May, after he became a diabetic, Cafergot was again prescribed for Hemingway's migraine headache. This was followed by a further use of Cafergot on June 9. On June 10, plaintiff's foot began hurting and he went to the Ochsner Hospital emergency room. At that time, he reported that in handling his motorcycle, it had fallen and injured his left foot. The Ochsner Foundation Hospital "Notes and Consultant's Reports" of June 16 state: "On 6/10/73 patient was injured while riding a motorcycle [this is incorrect the motorcycle fell while he was handling it] the bike fell across his left leg and foot and incurred only minor injury, seen here, X-rays negative and sent home. Left foot began swelling two days ago and became swollen and ecchymotic. Pain, swelling, and discoloration have increased." On the same sheet under the heading "Exam" there appears the entry "EXT—left foot cold and blue. No pulses in left foot." At the bottom of the page under the words "Imp [elsewhere used on the records

to indicate "impressions"] appears the entry "acute arterial insufficiency—left foot". On June 17, it appeared that the condition of the left foot had deteriorated and Dr. John Ochsner recommended a procedure known as an arteriogram. This procedure involved the insertion of a catheter into a main artery and the introduction of a dye which permitted the medical personnel to see the flow of blood in the affected area. The arteriogram was performed and it showed "diffuse vasospasm with potency to foot...." On the following day, Dr. Hutchinson made an entry "foot is more eschemic in appearance in spite of efforts at vasodiliatation. Dr. Ochsner suggested the possibility of venus occlusion which may be predominant problem. Sympathectomy may be of some benefit."[2]

Thereupon, Dr. Ochsner performed a left lumbar sympathectomy which, as the witnesses testified, was for the purpose of increasing the blood supply to the affected foot.

Thereafter during the next five or six days the plaintiff's foot improved in appearance and he was released to return home. At the bottom of the sheet following the entries as to the operation, there appear the following entries:

> Op. Note: Pre Op Dx—*Chronic* arterial insufficiency
>
> Left Foot.
>
> Post—Op. Same

[2] In dictionary language the first sentence of this entry means: "Foot shows more evidence of lack of blood in appearance in spite of efforts at enlarging the vessels."

Procedural—left lumbar sympathectomy

Surgeon—J. Ochsner

Assist—Ancalmo, Cofer, Manson

To R Room good condition.

J. Manson

[emphasis added]

By July 7, 1973, plaintiff's foot had turned cold again and was blue in color. He returned to the emergency room and Dr. Ancalmo, who had assisted with the sympathectomy, admitted him with the following physician's report:

> Post pancreatectomy for chronic pancreatitis. developed a cold left foot four weeks ago, sympathectomy [without] gross results. Returns with same problem—poss. Buerger's disease. Admit to Dr. J. Ochsner.[3]

As indicated above, the literature with respect to Cafergot staes that it is contraindicated in the case of a person who has Buerger's disease. Subsequently, at the trial, Dr. Ochsner testified that at the time Mr. Hemingway appeared on July 7, he knew that the patient was not suffering from Buerger's disease, in spite of the possibility noted by the receiving doctor. The physicians performed a continuous epidural block which relieved the plaintiff from the

[3] Buerger's disease is a vascular disease known as thrombosis angitis obliterans, which means an inflammation of the blood vessels with thrombosis in the veins and arteries. It causes blood clots in the veins and arteries and may thus cut off circulation.

severe pain he was suffering and introduced medications designed to dilate the plaintiff's blood vessels in order to promote circulation in his lower leg and foot.

On the morning of July 9, two days later, plaintiff woke up with a migraine headache. At 9:30 a.m., Dr. Moseley ordered Cafergot for the plaintiff. It was administered. A short while thereafter, Hemingway was visited by Dr. Ochsner who later testified that: "This foot was well and then suddenly it turned bad under our eyes."[4]

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[4] Dr. Ochsner testified to the occurrences beginning with the morning of July 9 as follows:

> A: Then he asked to take some of his medication, that he had a migraine headache, and he specifically called one—or one of the residents, namely Dr. Moseley, and Dr. Moseley asked him what he took and he said he took Cafergot, had taken it for many years, so Dr. Moseley gave him the Cafergot suppository.
>
> Q: Dr. Moseley, is he a resident?
>
> A: Yes, sir.
>
> Q: Who is he employed by, foundation or the hospital?
>
> A: He is employed by the foundation, which is the hospital.
>
> Q: Which is the hospital?
>
> A: All right.
>
> Q: So, Dr. Moseley, who is a doctor—then, of course, Dr. Moseley knew what his condition was at that time, is that correct?
>
> A: Yes.
>
> Q: He knew that you all had given him an epidural block and he knew you all had given him injections into the muscle to deaden the leg and to relax the muscle to let the blood flow so he wouldn't have a contracted or squeezed in blood vessel, is that right?

This condition was slowly remedied by the same intra-

(Footnote 4 continued)

A: Right.

Q: Yet he allowed him to take Cafergot at that time?

A: Correct. He had taken it on many occasions before.

Q: Before he became a diabetic?

A: And after he became a diabetic.

Q: On two occasions that we know of he ended up in the hospital with a darkened foot—

THE COURT:

Counsel, you are arguing your case. There will be a time when you may argue your case but now is not that time.

BY MR. TSCHIRN:

Q: At any rate, Dr. Moseley allowed him or gave him the Cafergot?

A: Yes.

Q: Now, what happened after he took the Cafergot? At that time he is on the road to recovery and his foot looking good and warmness back and pain is gone and everything.

What happened after he took the Cafergot?

A: A few hours later it began to get blue again.

Q: Turned blue again?

A: Yes, sir. That is when they came and told us the foot is getting blue again, and it was at that time that we said, well, something's got to be amiss here because this foot was well and then suddenly it turned bad under our eyes.

We went back and they said the only thing he's gotten is Cafergot? So then we automatically made the assumption that this man is—had an ergotrate intoxication from one or three reasons. We have to assume that it is a hypersensitivity

arterial injections that had previously been given to dilate the vessels.

The plaintiff introduced a prescription over Dr. Murison's signature dated June 9 which provided for Cafergot, P-B suppositories, 12 of them, one rectally as needed for pain. The following colloquy then occurred:

> Q: At least someone at Ochsner knew, on June 9th, before you had him in there on June 16th—someone knew he was on Cafergot, didn't they?

(Footnote 4 continued)

because he told us up until that time that he had not taken any Cafergot prior to the admission.

Q: He told you he had not taken Cafergot prior to the admission?

A: He had not taken any drugs prior to the admission.

Q: You keep saying Cafergot.

A: Excuse me. No, I don't keep saying Cafergot.

Q: Twice you have said it, once with regard to June and once with regard to July. You said he denied taking Cafergot and he didn't deny it, did he?

A: I said before he denied taking any drugs outside of insulin, and I will say that again.

THE COURT:

Is Cafergot a drug?

THE WITNESS:

Yes sir. It is my initial impression this man did take a drug, and you can take my entire staff and ask them that. This was my initial impression, this man was taking a drug. That is why I specifically asked him.

A: Yes, lots of people knew he was on Cafergot.

Q: I mean at Ochsner.

A: Yes.

Q: Lots of people knew it?

A: I assume. He had it two or three times before.

The recital of facts above is all undisputed, except for the fact that Dr. Murison and Dr. Ochsner undertook at the trial to qualify from time to time the statements attributed to them. We give the facts most favorable to the plaintiff, because we are required to do so in considering whether there was sufficient evidence for the case to be submitted to the jury.

In addition to the foregoing facts, there was a serious dispute about statements by Drs. Ochsner and Murison to Hemingway's mother and wife.[5] Mrs. Hemingway, Sr. testified that on July 9, she was at the hospital and her son had a severe migraine (this is the day on which Dr. Moseley had prescribed Cafergot for the migraine). She testified that his foot changed color and got cold and she got in touch with Dr. Ochsner who then had him taken "to the operating room downstairs." At that time, she met with Dr. John Ochsner and she testified:

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[5] His mother and father lived in Atlanta and talked on the telephone to Dr. Ochsner on the eve of the operation performed for the sympathectomy on June 17, at which time the father testified that Dr. Ochsner called him on the telephone and "said that Ronnie's foot, his left foot, was in very bad shape and that he recommended a sympathectomy, that he be operated on, because if he didn't, he was going to lose the foot and maybe part of the leg". The mother and father both went to New Orleans and arrived at the hospital just as the sympathectomy had been completed. They returned to Atlanta after the foot appeared better but went back again on July 7.

> He said to me "your son has an artery infection or disease" which he called Buerger's which I didn't understand and I asked him what that meant, and he said it meant that the arteries were going into the foot, as they neared the foot at the ankle had collapsed and that no blood could get into the foot and that this was possible—possibility that it could happen to other parts of his body, his other leg or his arms and I asked him, I said: "Well, does this have to do with his big operation and all that? Would this cause this?" and he said: "No, this is a separate thing, a separate disease," and he said: "It is necessary that we schedule an amputation tomorrow morning at 6 o'clock."

Hemingway's wife testified that she was present at the time of this conversation and stated that her recollection was the same as testified to by Mrs. Hemingway, Sr. Dr. Ochsner testified that he had not said Hemingway had Buerger's disease and he had not said he planned to amputate the foot.

Finally, it should be noted that the admission slip on June 16 contains the entry: "PX: acute arterial insufficiency left foot" and the discharge summary, following discharge on June 23, contained the entry: "Acute arterial insufficiency [undecipherable, but possibly etioloty unknown]."

II. PRELIMINARY LEGAL QUESTIONS

In addition to the contention about the administering of Cafergot at a time when the doctors were attempting to clear up arterial insufficiency in his left foot, Hemingway makes a further more serious contention relating to

the sympathectomy. He contends that he was not advised by Dr. Ochsner of any side effects of the sympathectomy. Dr. Ochsner testified that there are no side effects. Hemingway sought to introduce at the trial a text called "Medical-Surgical Nursing" written by two registered nurses. This text listed potential results from a sympathectomy. One of these results listed by these writers was "loss of ejaculation in the male." Upon objection, the court ruled that the plaintiff had failed to establish the degree of recognition required for the introduction of such a text. This ruling was correct under Rule 803(18) of the Federal Rules of Evidence, which require that for a party to rely upon a learned treatise it must be established as a reliable authority by the testimony or admission of a witness or by other expert testimony or by judicial notice. There was no testimony that recognized this document as a reliable authority and the trial court correctly ruled that it could not be recognized by judicial notice, since it had been written by registered nurses.

Respecting his claim of loss of sexual powers, the appellant contends that since the proof showed that these had been unimpaired prior to the sympathectomy but had been almost totally lost thereafter, he should have prevailed under the doctrine res ipsa loquitur. The trial court properly declined to accept this contention, since there were many medical frailties affecting the plaintiff. *Hayward v. Echols,* 362 F.2d 791 (5th Cir. 1966).

We must therefore conclude that there was no proof at the trial that would have permitted the jury to have found in favor of the plaintiff as to this particular complaint.

III. THE DIRECTED VERDICT

The parties do not disagree as to the standard to be applied by the trial court in determining whether there is sufficient evidence to warrant submitting the case to the jury. The principles enunciated in *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) are too well known to require restatement here. The trial court directed the jury's verdict in favor of the defendants here on the two grounds already noted above: 1) as to the claim against the doctors, the court found that there was a failure on the part of the plaintiff to produce evidence "as to the standard of care generally practiced by other physicians in this community or in the community in which these defendant physicians practice in similar situations" and "there has been no evidence offered by the plaintiff tending to show that the defendant doctors negligently failed to follow such a standard." 2) As to the foundation and hospital defendants, the court decided that in the absence of adequate evidence to establish a claim against the doctors, the hospital and foundation with which they were associated could not be found negligent on this record.

We deal first with the proof of what is known generally as the "locality rule" by which the performance of doctors has traditionally been measured under the Louisiana law. The trial court cited *Hayward v. Echols*, 362 F.2d 791 as a principal basis of its determination. Both parties at the trial and in this court are in agreement that the plaintiff in a malpractice case would carry the burden of establishing that the doctor failed to meet the standard which may be expressed as it was by this court in *Mills v. Levy*, 537 F.2d 1331 (5th Cir.) at 1332:

[P]hysicians and surgeons are not negligent if

they exercise that degree of skill and care which is usually possessed and exercised by practitioners of their profession in the same locality or community.[6]

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[6] Significantly, the Louisiana Code dealing with this subject matter has been amended and given retroactive effect, as it relates to medical or surgical specialists. La.R.S. 9:2794 provides in pertinent part:

> (A) In a malpractice action based on the negligence of a physician licensed under R.S. 37:1261 et seq. or a dentist licensed under R.S. 37:751 et seq., the plaintiff shall have the burden of proving:
>
> (1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians or dentists practicing in the same community or locality to that in which the defendant practices; *and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians or dentists within the involved medical specialty.*
>
> (2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill, and
>
> (3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

[Emphasis added.]

In *Ardoin v. Hartford Accident Indemnity Co.*, 360 So.2d 1331 (La.1978), the court indicated that this section had been modified, in effect, to permit the proof of the standard applicable to medical specialists without limiting the proof to those who are familiar with the performance within the particular locality or community.

Although some of the defendants here were specialists, it is unimportant for us to consider this section of the Louisiana Code because the actions complained of were not actions that require the services of a specialist. Moreover, as indicated by the Louisiana Supreme Court, the purpose of the legislation was to make easier, not more difficult, the proof necessary to establish the standard of performance of the professional duty of the physician. Here, the plaintiff met the more difficult "locality rule."

The language of this Court in *Hayward* must have caused the trial court here to conclude that in order to establish both the standard and the deviation therefrom in a Louisiana case there must be positive, affirmative evidence as to the abstract standard, produced independently by the plaintiff, together with testimony at the trial of a qualified physician that the defendant failed to measure up to such standards. This conclusion may have come from the language in our *Hayward* opinion:

> Where, as here, no surgeon or other expert in the field of neurosurgery testified that Dr. Echols had proceeded negligently in making the final diagnosis or in the performance of the operation, or that the operation was not proper in every respect, plaintiff is not entitled to recover for malpractice.

362 F.2d at 797.

Of course, in using such language in *Hayward*, this court dealt with the record before it. The record here is something entirely different. As shown by our recitation of the facts, the defendant doctors clearly established the community standard touching on the prescribing of medication that constricted the blood vessels at a time when the jury could infer that the defendants had knowledge that the patient was suffering from a disease evidenced by too greatly constricted blood vessels. This is clear from the testimony, quoted above, to the effect that the community standard was that a physician would not, except under exceptional circumstances, administer a drug when it was contraindicated by a disease from which the patient was suffering. Here it is clear that the jury could infer that there was ample knowledge on the part of the appropriate persons in both hospital and clinic that Hemingway was threatened by, and

actually suffering from, peripheral vascular insufficiency, which Dr. Murison testified would amount to "peripheral vascular disease." The jury could also infer that at the time the sympathectomy was performed by Dr. Ochsner that procedure was thought to be required because of a condition caused by prescription by other doctors of a vascular constricting medication. Moreover, the jury could, of course, have believe the testimony of the mother and wife of the plaintiff who testified that on an occasion before the last Cafergot was prescribed for Hemingway, the surgeon had stated to them that the patient was suffering from Buerger's disease, which was clearly a contraindication for the use of such medication.

So far as the responsibility of the hospital and foundation are concerned, there was further proof in the hospital and clinic records from which the jury could infer that at the time that the patient was being treated for lack of blood supply to his left foot, he was being given medication which further constricted the blood supply generally. Our attention has been called to the recent Louisiana case of *Bryant v. St. Paul Fire & Marine Ins. Co.*, 365 So.2d 537 (La.App.1978) which holds that the liability of a hospital to a patient depends upon proof of ordinary negligence or as the court in *Bryant* stated from the Louisiana Supreme Court decision in *Hunt v. Bogalusa Community Medical Center*, 303 So.2d 745 (Sup.Ct.La.1974):

> A hospital is bound to exercise the requisite amount of care toward a patient that the particular patient's condition may require. It is the hospital's duty to protect a patient from dangers that may result from the patient's physical and mental incapacities as well as from external circumstances peculiarly within the hospital's control. A determination of whether a hospital has breached the duty of care it owes to a particular patient depends upon the circumstances and the facts of that case.

303 So.2d 745, 747.

The *Bryant* court then said:

> The standard of care enunciated above does not require the establishment of a "community standard" in order to make a determination of negligence of hospitals.

365 So.2d at 540.

The trial court placed its decision to direct a verdict in favor of the hospital and clinic upon its assumption "that the plaintiff would visit liability on the defendant Ochsner Clinic and the defendant Foundation Hospital through the alleged negligence of the doctor defendants here." To the extent that the trial court relied upon the failure to establish sufficient evidence of the doctors' liability under the "community standard," it would be improper for the court to hold the plaintiff to the strict proof against the hospital and clinic that is required as against the doctors. However, the court further stated "nor has there been any evidence of any other negligence [besides that of the doctors] which could be attributable to the defendant Ochsner Clinic and defendant Ochsner Foundation which would warrant us denying the motion for a directed verdict." What we have stated above with respect to the error in directing the verdict against the doctors, of course, applies with greater force against the other defendants in light of the fact that the plaintiff is not required to prove either the existence of or the content of a "community standard" to establish liability of the hospital and foundation. There was more than sufficient evidence from which the jury could have inferred negligent conduct by these two defendants as well as by the doctors.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX "C"

JURY INSTRUCTIONS ON DAMAGES

The law allows simple reparation, that is, a just and adequate compensation for injury. It does not permit damages to be awarded in order to punish a party.

If you determine that damages should be awarded, the amount of damages you award must be reasonable, that is, in an amount as will fairly and reasonably compensate the plaintiff for any damage which was legally caused by any negligence of any or all of the defendants.

You may not award damages for any injury unless it has been established by a preponderance of the evidence that the damage was legally caused by the negligence of defendants. Injury or damage is legally caused by negligence if the negligence played a substantial part in bringing about or actually causing injury or damage.

You may not award speculative damages. This means that you must not include in any verdict compensation for any loss which, although possible, is wholly remote or conjectural. However, damages are not speculative merely because they cannot be computed with mathematical certainty. You may award damages where the evidence permits you to reasonably approximate them.

The statements of any of the lawyers as to their estimate of the damages to be awarded in this case are not evidence and they are to be disregarded by you unless they are supported by the evidence. Always remember that the determination of damages is solely your function and must be based on competent evidence.

If you find the plaintiff is entitled to damages, you may include the following elements of damages if you find they have been proven by a preponderance of the evidence to have been legally caused by the accident:

—physical pain and suffering, both past and future;

—mental pain and anguish, including embarassment, fear, worry, nervousness, scars, disfigurement and humiliation, both past and future;

—impairment of bodily functions and disability or other residual effects of the physical injuries as shown by the evidence, including any limitation of normal physical functions and activities incident to daily living, past and future.

No evidence of the value of such intangible things as mental and physical pain and suffering has been or need be introduced. In that respect, it is not value you are trying to determine, but an amount that will fairly compensate the plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in the light of the evidence.

If you should determine from the evidence that, as a result of the negligence of defendants, plaintiff will sustain in the future some permanent disability, whether it be total or partial, or any other future damage, you may consider in determining the amount of damages to be awarded that (applicable mortality tables show that) the plaintiff, who is presently 33 years of age, has a life expectancy of 38 years.

The life expectancies as shown by these tables are

based on averages of all people, healthy, sick, old, young, etc., and you, in considering such expectancies, must remember that they are only an average.

In this connection, you may consider that some persons exceed, while others do not live out, their life expectancies.

APPENDIX "D"

Minute Entry
December 8, 1981
BOYLE, J.

CIVIL ACTION
NO. 74-1657
SECTION D

GLEN R. HEMINGWAY

VERSUS

OCHSNER CLINIC AND/OR OCHSNER FOUNDATION HOSPITAL, ET AL

(Filed 12-9-81)

The defendants' Motion for Directed Verdict made at the close of all evidence is DENIED and the Clerk is directed to enter judgment on the verdict herein in favor of the plaintiff and against the defendants, Ochsner Clinic and Ochsner Foundation Hospital, in the sum of $365,000.00 plus interests and costs, and in favor of the defendants, Dr. Paul J. Murison and Dr. John J. Ochsner, dismissing the plaintiff's complaint at his cost.

Darryl J. Tschirn
John M. Robin

Henry B. Alsobrook, Jr.
Jean M. Farquharson

APPENDIX "E"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 74-1657
SECTION D

GLEN R. HEMINGWAY

VERSUS

OCHSNER CLINIC AND/OR OCHSNER FOUNDATION HOSPITAL, DR. JOHN OCHSNER, DR. PAUL J. MURISON, DR. W. H. MOSBY, ARGONAUT SOUTHWEST INSURANCE COMPANY

(Filed Dec. 16, 1981)

CORRECTED JUDGMENT

Considering the Court's direction to enter judgment on the jury verdict herein, accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Glen R. Hemingway, and against the defendants, Ochsner Clinic and Ochsner Foundation Hospital, in the sum of $365,000.00 together with legal interest from the date of judicial demand until paid and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendants, Dr. Paul J. Murison and Dr. John J. Ochsner, and against plaintiff, Glen R. Hemingway, dismissing the plaintiff's complaint at his cost.

New Orleans, Louisiana, this 16th day of December, 1981.

/S/ Signed
CLERK, U.S. DISTRICT COURT

APPROVED AS TO FORM:

/S/ Signed
UNITED STATES DISTRICT JUDGE

APPENDIX "F"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 74-1657-EJB

GLEN R. HEMINGWAY

VERSUS

OCHSNER CLINIC AND/OR OCHSNER FOUNDATION HOSPITAL, ET AL

(Filed 4-5-82)

MEMORANDUM OPINION AND ORDER

Darryl J. Tschirn
John Robin

Attorneys for Plaintiff

Henry B. Alsobrook, Jr.
Jean M. Farquharson
Adams & Reese

Attorneys for Defendants

BOYLE, District Judge:

This matter came before the court on the defendants', Ochsner Clinic and Ochsner Foundation Hospital, motion for judgment notwithstanding the verdict and, alternatively, for a new trial. The trial of this medical malpractice case resulted in a jury verdict for the plaintiff, Glen R. Hemingway, in the amount of $365,000, against

defendants Ochsner Clinic and Ochsner Foundation Hospital.[1] The jury found staff doctors negligently failed to follow the recognized standard of care in the diagnosis or treatment of plaintiff's condition and that such negligence was a legal cause of any injury or damage suffered by plaintiff. Before the case went to the jury, the parties entered into a stipulation whereby Ochsner Clinic and Ochsner Foundation accepted responsibility for any negligence found on the part of staff doctors. Tr., Vol. 1, p. 157. The remaining two defendants, Dr. Murison and Dr. Ochsner, were absolved on the jury's finding neither was negligent in his treatment of the plaintiff.

At the close of the evidence both parties moved for directed verdicts. Although the plaintiff's motion was denied in open court, decision on the defendants' motions was reserved. Following the jury's verdict, defendants' motions were denied and judgment was ordered entered on the verdict. The jury's verdict in favor of defendants Dr. Murison and Dr. Ochsner is not challenged. Defendants Ochsner Clinic and Ochsner Foundation Hospital timely filed this motion for judgment notwithstanding the verdict and, in the alternative, a new trial.

I. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The test for determining whether to grant a motion for judgment notwithstanding the verdict in this diversity

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[1] The grant of motions for directed verdict removed from the jury's consideration the vicarious liability of Ochsner Clinic and Ochsner Foundation Hospital based on the actions of nurses, pharmacists or other personnel except Dr. Ochsner and Murison and other involved doctors at Ochsner Clinic and Ochsner Foundation Hospital. Trial Transcript, Doc. 152 [hereinafter Tr.], Vol. III, pp. 88-128.

case is a federal standard and the same as that applied to a motion for directed verdict. *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 738 (5th Cir. 1980), 9 Wright & Miller, Federal Practice and Procedure: Civil § 2537 at 599. "[I]f there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied...." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc); *Williams v. United Insurance Co. of America*, 634 F.2d 813, 815 (5th Cir. 1981). In passing on a motion for judgment notwithstanding the verdict, the court must view all of the evidence in the light most favorable to the party opposing the motion, resolving conflicts in the evidence and drawing all reasonable conclusions and inferences from the evidence in that party's favor. The court is not free to weigh conflicting evidence and inferences, to pass on the credibility of witnesses or to substitute its judgment of facts for that of the jury. As we are concerned only with the question of negligence in the care of plaintiff on the part of doctors serving on the staffs of Dr. Ochsner and Dr. Murison, we must consider whether the facts and inferences, viewed in the light most favorable to the plaintiff, "point so strongly and overwhelmingly in favor of [the defendants Ochsner Clinic and Ochsner Foundation Hospital, as employers of the staff doctors] that reasonable jurors could not arrive at a contrary verdict." *H. C. Blackwell Co., Inc. v. Kenworth Truck Co.*, 620 F.2d 104, 106 (5th Cir. 1980).

Plaintiff argues the jury could have found staff doctors on the service of Dr. Ochsner and Dr. Murison were negligent in that they administered Cafergot to plaintiff when the drug was contraindicated. Liability on the part of Ochsner Clinic and Ochsner Foundation Hospital was

predicated on a finding of negligence on the part of their employee staff doctors under a theory of respondeat superior. Under this theory, "[t]he duty of care at issue is that of the servant and it must be proved that this duty was breached before the master can be held liable." *Bryant v. St. Paul Fire and Marine Ins. Co.*, 382 So.2d 234, 237 (La.App.3rd Cir. 1980). Thus under the applicable Louisiana law, plaintiff had to prove, by a preponderance of the evidence:

> 1) The recognized standard of care ordinarily exercised by physicians within the medical specialty of the doctors with regard to the diagnosis and treatment which is in controversy in this case;
>
> 2) That the doctors negligently failed to follow the recognized standard of care in the diagnosis or treatment of plaintiff; and
>
> 3) that such negligent failure to follow the recognized standard of care in the diagnosis or treatment of plaintiff was the legal cause of plaintiff's alleged injuries.

LSA-R.S. 9:2794.

The applicable standard for administration of drugs was established by the medical testimony. All of the doctors agreed a doctor should not administer a drug to a patient when it is contraindicated, absent a compelling reason to do so. Having reviewed the trial transcript and the documents admitted into evidence, in the light most favorable to the plaintiff, we conclude the jury could reasonably have inferred a staff doctor ordered Cafergot, a drug containing caffeine and ergotamine used for migraine headaches, for plaintiff when the drug was contraindicated.

The literature on Cafergot introduced into evidence lists the contraindications to Cafergot as being hypertension, impaired hepatic or renal function, sepsis and pregnancy, hypersensitivity to any of the components and peripheral vascular diseases such as coronary heart disease, syphilitic arteritis, marked atherosclerosis, thrombophlebitis and Raynaud's or Buerger's syndrome. Trial Exhibits, December 1, 1981, P-2, Pharmaceutical Sheet; Trial Exhibits, December 1, 1981, P-3, Pharmacology Textbook, p. 878. Of these contraindications, the jury could have determined plaintiff suffered from hypersensitivity to ergotamine in June and July, 1973, and that Dr. Moseley, a staff doctor on the service of Dr. Ochsner, should have been aware of such fact from the plaintiff's chart at the time he ordered Cafergot for plaintiff on July 9, 1973.

Plaintiff was admitted to the hospital on July 7th for loss of circulation in his left foot. An epidural block was begun immediately and by the next morning his foot had improved markedly. Dr. Moseley visited plaintiff at 7:30 a.m. on July 9, 1973 (Ochsner Medical Record, Vol. III, Nurses Notes for July 9, 1973), and found plaintiff's foot warm, pink and looking very good. Tr., Vol. III, p. 143. Plaintiff received his last epidural block the night before and it was decided such treatment was no longer required as the left foot was warm and pink. Tr., Vol. III, p. 144.

Later on the morning of July 9th, at approximately 9:00 o'clock, Dr. Moseley was called to plaintiff's room when plaintiff complained of a migraine headache. Plaintiff asked the doctor for Cafergot because the anti-nausea medication which he had been given earlier by the nurse had not been effective. Tr., Vol. III, pp. 144-145. Mr. Hemingway told Dr. Moseley he had been taking Cafergot for some time for relief from migraines, Tr., Vol. III, pp. 145-

146, and testified at trial he had been taking Cafergot regularly since December, 1971.[2] Tr., Vol. III, pp. 36, 49. Dr. Moseley then ordered the nurse to administer Cafergot to plaintiff. Two to three hours later Dr. Ochsner and Dr. Moseley were called to plaintiff's room after plaintiff's left foot had started turning blue and cold.

Plaintiff was then taken to anesthesiology and an epidural block was started. The first injection of medication to dilate the arteries had no effect on the lack of circulation in plaintiff's left foot. However, the second administration of medication began to produce the desired effect. By the evening of July 9th, plaintiff's foot began to show improvement, which continued throughout the following days, during which the artery dilation medication was administered. In addition to the medication injected through the epidural block, plaintiff also received treatment for the blisters on the tips of the toes of his left foot, which blisters had resulted from the loss of circulation in his foot.

On July 14, 1973, plaintiff was discharged from the hospital. He returned to the clinic two or three times in July and August, 1973, for a routine followup on his left

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[2] Furthermore, plaintiff had been administered an ergotamine for relief of migraine headaches on two previous occasions during visits to Ochsner Foundation Hospital. On January 3, 1973, while admitted to Ochsner Foundation Hospital for pancreatitis, plaintiff received a Cafergot suppository. Ochsner Medical Records, Vol. 1. Then on April 29, 1973, in the emergency room of Ochsner Foundation Hospital, plaintiff received D.H.E.-45, a drug similar to Cafergot containing ergotamine. Ochsner Medical Records, Vol. III; Tr., Vol. II, pp. 7-8. Plaintiff did not experience any ill effects from either one of these administrations of ergotamine. Tr., Vol. II, pp. 3-4, 8.

foot.[3] Ochsner Medical Record, Vol. III; Tr., Vol. I, p. 229; Tr., Vol. II, p. 31. The discharge summary from this hospital stay reveals the doctors diagnosed plaintiff's condition to be "ergot poisoning." Ochsner Medical Record, Vol. III. Although this diagnosis was made and noted in the record after the July 9th episode, the evidence supports the inference plaintiff was suffering from ergot poisoning prior to receiving the Cafergot on the 9th.

Dr. Ochsner defined ergot poisoning as being, among other things, a sensitivity to ergotamine, a vasoconstrictant. Tr., Vol. I, p. 72-74. Dr. Murison testified when one gets ergot poisoning "[a]ll of the peripheral arteries contract and coldness is in all of the extremeties, even though one may be more severely involved than the other." Trial Transcript, Doc. 77, pp. 117-118. When plaintiff was admitted to Ochsner Hospital on July 7th, Dr. Ancalmo, also a staff doctor, noted "[t]here is generalized vasoconstriction involving all extremeties" in addition to the blue, cold left foot. Ochsner Medical Record, Vol. III. In the same note, Dr. Ancalmo made a stick figure drawing of the human body with pulse readings at the relevant points. The pulse readings indicated normal circulation throughout plaintiff's body except for his left foot.

Dr. Ochsner was questioned about this apparent inconsistency. He stated plaintiff probably showed some symptoms and signs of vasoconstriction at that time which

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[3] Plaintiff continued to be treated at Ochsner Clinic until September 25, 1973, shortly before he moved to Atlanta, Georgia. These visits, however, were not for treatment of his left foot, but for treatment of his diabetes, for "suture granuloma" along the incision made during his pancreatectomy and for apparent drug addiction resulting from the administration of codeine to control his complaints of pain during various hospital stays. Ochsner Medical Records, Vol. III.

were noted by Dr. Ancalmo, but the generalized vasoconstriction had to be minimal as plaintiff also showed normal circulation as indicated by the pulse readings. Tr., Vol. I, pp. 176-177. The jury, however, could have concluded Dr. Ancalmo's note of "generalized vasoconstriction" accurately described plaintiff's condition on July 7th and, hence, that it showed signs of hypersensitivity to ergotamine at that time.

Furthermore, the jury could have concluded plaintiff continued to show signs of hypersensitivity to ergotamine on July 9th when he was administered Cafergot. The nurses' notes for the morning of July 9th, prior to the administration of Cafergot, read, in part, "left foot warm to touch, foot white but toes do not blanch well." Ochsner Medical Record, Vol. III. On direct examination, Dr. Ochsner incorrectly read the note as saying "...toes do not blanch" and testified this notation meant there was no vasoconstiction and no evidence of poor circulation. Tr., Vol. I, p. 214. However, on cross examination, when the failure to include the last word in the sentence, "well," was brought to the court's attention, Dr. Ochsner testified this note indicated plaintiff did not have good circulation at that time. Tr., Vol. II, p. 30. The jury was free to resolve the conflict in plaintiff's favor and concluded plaintiff did not have good circulation in his foot on the morning of July 9th and the lack of circulation was due to hypersensitivity to ergotamine.

This view is supported by Dr. Ochsner's testimony in a prior trial that following the July 9th episode, it appeared there was a relationship between Cafergot and the loss of circulation in plaintiff's foot on June 16th, July 7th and again on July 9th. Tr., Vol. I, p. 194. At the trial Dr. Ochsner modified this testimony stating there was no way

to prove or disprove that the events of June 16th and July 7th and 9th were related to plaintiff's prior use of Cafergot. Tr., Vol. II, pp. 56-58.

There is sufficient evidence to permit the jury to find that the negligence it found was a legal cause of plaintiff's injuries. Evaluating all of the evidence in the light most favorable to plaintiff, we cannot say the facts and inferences point so strongly and overwhelmingly in favor of the moving defendants that reasonable jurors could not reach a verdict in plaintiff's favor.

II. MOTION FOR NEW TRIAL

Having considered defendants' motion for judgment notwithstanding the verdict, we now turn to the alernative motion for a new trial. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S.Ct. 189, 194, 85 L.Ed. 124 (1940). Unlike a motion for judgment n.o.v., which raises the issue of legal sufficiency of the evidence, a motion for a new trial is addressed to the sound discretion of the court which may set aside the verdict if it is contrary to the preponderance of the evidence, although a judgment n.o.v. is not justified or if, for other reasons, it will result in a miscarriage of justice. *United States v. Bucon Construction Company*, 430 F.2d 420, 423 (5th Cir. 1970); 6A Moore's Federal Practice ¶ 59.08[5]; 8 Wright & Miller, Federal Practice and Procedure: Civil §§ 2805, 2806.

Defendants contend the jury's determination of liability is contrary to the weight of the evidence and damages are so excessive as to shock the conscience of the court. The important first step in assessing this motion is to separate the liability and damages issues. We have previously discussed the evidence supporting the conclusion that Cafergot was

negligently administered to plaintiff on July 9, 1973, when plaintiff was suffering from hypersensitivity to ergotamine, a contraindication to the use of Cafergot.

The jury's determination of damages, however, is not supported by a preponderance of the evidence. The jury's award of $365,000.00 is shockingly excessive and was made although any alleged ill effects from the July 9th administration of Cafergot had dissipated by mid-August. Plaintiff has made no claim of "Cafergot damage" resulting from Cafergot administered to him on any other occasion by doctors at Ochsner Clinic or Ochsner Foundation Hospital. As discussed above, plaintiff received treatment for the loss of circulation in his foot on July 9th as soon as the doctors learned of his condition. Although it took some time to achieve results from the epidural block, by the next morning his foot showed marked improvement. By the time he was discharged five days later, he was only being treated for the blisters which had developed on the tips of the toes of his left foot, and this treatment ceased by the middle of August.

Plaintiff might, arguably, contend he also suffered injury when, on the afternoon of July 9th, he was allegedly informed by Dr. Ochsner he had Buerger's disease and his leg would have to be amputated. Tr., Vol. I, pp. 255-257; Tr., Vol. III, pp. 12-13, 16; Tr., Vol. III, pp. 70-71. According to plaintiff, whose mother and wife testified similarly, Dr. Ochsner informed plaintiff of the Buerger's disease and the need to amputate his leg while he was in anesthesiology and the epidural block was being started. Tr., Vol. III, p. 70-71. Plaintiff seems to contend that reversal of the decision to amputate came late on the afternoon of the 9th when the relationship of Cafergot to his foot condition was realized by the doctors. Tr., Vol. III, pp. 69-74.

Dr. Ochsner denied ever telling plaintiff, plaintiff's wife or plaintiff's mother that plaintiff was suffering from Buerger's disease and his left foot would have to be amputated. Tr., Col. I, pp. 201-204; Tr., Vol. II, pp. 47-49. Furthermore, both Dr. Ochsner and Dr. Moseley refuted plaintiff's account of what transpired on July 9th after his foot began to turn blue. Tr., Vol. I, pp. 197-199, 200-201; Tr., Vol. III, pp. 147-149.

The testimony of Dr. Ochsner and Dr. Moseley is unrefuted and uncontradicted that the impression of "possible Buerger's disease" made on July 7, 1973, by the admitting doctor, Dr. Ancalmo, also on the service of Dr. Ochsner, was ruled out by them on the evening of July 7th after obtaining the results of the angiogram. Tr., Vol. I, pp. 92-93; Tr. Vol. II, p. 43; Tr., Vol. III, pp. 146-147. There is no evidence suggesting Buerger's disease was ever again considered by the doctors as the cause of plaintiff's problems with his left foot. As to the allegation that Dr. Ochsner informed plaintiff his foot would be amputated, Dr. Ochsner testified that before the amputation of any limb would be scheduled he would have to consult with an orthopedic surgeon and obtain the consent of the patient. Tr., Vol. II, pp. 48-49. The medical records reveal no such procedures were taken. It is interesting to note that similar procedures were followed by Dr. Ochsner prior to his performing a sympathectomy on plaintiff, despite the emergency nature of the procedure. In particular, Dr. Ochsner obtained the written consent of the patient and clearance from internal medicine before he performed the operation. If the jury concluded that plaintiff was told his foot would have to be amputated, the evidence shows that within a few hours thereafter he was aware that such was not the case.

It appears the jury was influenced by the plaintiff's present condition but failed to give appropriate consideration to the undisputed evidence that Mr. Hemingway is a surgical diabetic whose condition is very difficult to control, and that since his pancreatectomy in the spring of 1973, plaintiff has been unable to work and has experienced numerous medical complications. Tr., Vol. III, pp. 74-76, 80-86. The evidence clearly shows this unfortunate condition and plaintiff's present difficulties with circulation in his foot do not result from the administration of Cafergot by Ochsner staff doctors on the service of Dr. Ochsner or Dr. Murison but, are due, instead, to plaintiff's diabetes. Dr. Murison testified "diabetics are eventually going to get into trouble with their circulation" which condition is hastened in brittle diabetics and diabetics who smoke heavily, such as plaintiff. Trial Transcript, Doc. 77, pp. 57-60. Dr. Ochsner testified that a recent examination of plaintiff's left foot indicated clearly to him that plaintiff's present problems were due to diabetes and not to the use of Cafergot. Dr. Ochsner's testimony was neither refuted nor contradicted by plaintiff or the medical evidence.

A damage award may be set aside unless it is "clearly within the universe of possible awards which are supported by the evidence." *Narcisse v. Illinois Cent. Gulf R. Co.*, 620 F.2d 544, 547 (5th Cir. 1980). The jury could not reasonably have computed damages to be $365,000.00 for the maximum thirty-six day period over which it might reasonably be found plaintiff sustained any loss.

A jury's finding of liability can be binding even though its monetary award is found to be excessive. *Edwards v. Sears, Roebuck and Co.*, 512 F.2d 276, 282 (5th Cir. 1975). As we have determined the fact of liability is fairly demonstrated by the evidence and only the damages

award has been tainted by improper jury action, we may order a remittitur or a new trial addressed to damages alone. *Id.; Hadra v. Herman Blum Consulting Engineers,* 632 F.2d 1242, 1245-1246 (5th Cir. 1980); 8 Wright & Miller, Federal Practice and Procedure: Civil § 2815. We find the maximum amount the jury might reasonably have awarded plaintiff for his injuries[4] is $15,000 *See Gorsalitz v. Olin Mathieson Chemical Corporation,* 429 F.2d 1033, 1047 (5th Cir. 1970); *Glazer v. Glazer,* 278 F.Supp. 476, 479-482 (E.D. La. 1968).

For the foregoing reasons,

IT IS ORDERED that:

1. The defendants' motion for judgment n.o.v. is DENIED.

2. The defendants' motion for a new trial on the issue of liability is DENIED.

3. The verdict of the jury on the issue of damages only in favor of the plaintiff and the judgment entered thereon on December 10, 1981 be set aside and a new trial allowed on the issue of damages only unless with twenty (20) days of the date of entry of this order the plaintiff files in the record of these proceedings a remittitur of that amount of the aforesaid jury award and judgment in excess of $15,000.00.

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[4] The motions for directed verdict of all defendants with respect to the plaintiff's claims for damages for future medical expenses, past wage loss, and loss of future earning capacity were granted in open court on December 4, 1981. Tr., Vol. III, p. 128.

/S/ Signed
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
April 5, 1982

APPENDIX "G"

Minute Entry
May 13, 1982
BOYLE, J.

CIVIL ACTION
NO. 74-1657-EJB

Filed May 14, 1982

GLEN R. HEMINGWAY

VERSUS

OCHSNER CLINIC AND/OR OCHSNER FOUNDATION HOSPITAL, ET AL

On April 5, 1982, we denied motions of defendants Ochsner Clinic and Ochsner Foundation Hospital for judgment n.o.v. and for a new trial on the issue of liability but we set aside the jury's verdict on the issue of damages only, together with the judgment entered thereon on December 10, 1981, and allowed a new trial on the issue of damages only unless the plaintiff agreed to a remittitur. Record, Doc. 158, Memorandum Opinion and Order, p. 12. Plaintiff now moves the court for permission to appeal the latter portion of our April 5th order. Record, Doc. 159. The defendants have opposed plaintiff's motion. In the alternative, they have requested leave to take an appeal from our denial of their motions for judgment n.o.v. and for new trial as to the issue of liability, which appeal has already been filed.

An order granting a new trial, even when accompanied by a provision for remittitur, is an interlocutory order not appealable as a final judgment. *Evers v. Equifax, Inc.*, 650 F.2d 793, 796 (5th Cir. 1981); *Dillard Dept. Stores*

v. Fidelity Union Life Ins. Co., 508 F.2d 331, 332 (5th Cir. 1975); *Eaton v. National Steel Products Company*, 624 F.2d 863, 864 (9th Cir. 1980). *See Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 254, 61 S.Ct. 189, 196 (1940). If plaintiff accepts the remittitur, plaintiff may not then challenge the correctness of the remittitur order. This is true regardless of whether plaintiff's acceptance is "under protest." *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649, 97 S.Ct. 835, 836 (1977); *Keene v. International U. of Operating Eng., etc.*, 569 F.2d 1375, 1381 (5th Cir. 1978). If the remittitur is refused, as in this case, the appeal with respect to the order properly awaits entry of a final judgment in the second trial. Only in extraordinary circumstances, such as when the court lacks jurisdiction to dispose of the motion, may a direct appeal be had. *Wiggs v. Courshon*, 485 F.2d 1281, 1282 (5th Cir. 1973); 11 Wright & Miller, Fed. Practice & Procedure § 2818 at 113, 114. No such jurisdictional defects are present in the instant case. Accordingly, an appeal pursuant to 28 U.S.C. § 1291 will not lie.

Plaintiff argues the issue should be certified for appeal under 28 U.S.C. § 1291(b). We find none of the conditions for the appeal of an interlocutory order pursuant to 28 U.S.C. § 1292(b) have been satisfied in this case. *See Eaton v. National Steel Products Co., supra;* 15 Wright & Miller, Fed. Practice & Procedure § 3915 at 596 n.21.

Accordingly, having considered the memoranda of counsel and the applicable law, the motions of plaintiff and defendants are hereby DENIED.

Darryl Tschirn
John Robin

Henry Alsobrook
Jean Farquharson

APPENDIX "H"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
McNAMARA, J.
December 8, 1982

CIVIL ACTION
NO. 74-1657
SECTION "D"

GLEN R. HEMINGWAY

VERSUS

OCHSNER CLINIC AND/OR OCHSNER
FOUNDATION HOSPITAL, ET AL

A Status Conference was held in the above captioned matter this date.

PRESENT:

Darryl J. Tschirn, Esq. and
John Robin, Esq.
Counsel for Plaintiff

Henry B. Alsobrook, Jr., Esq. and
Jean M. Farquharson, Atty. at Law
Counsel for Defendants

The parties agreed, that unless the Court receives an objection in writing within seven (7) days of this Minute Entry, the new trial of this matter, on the issue of damages as ordered by the Court on April 5, 1982, shall be tried by the Court without a jury. It was further agreed that the

Court will not receive any additional evidence but will determine the matter on the basis of the Court Reporter's transcript of the testimony taken at the trial of this matter in December of 1981, and the documents introduced into evidence at that trial. As per the Court's Order of April 5, 1982, the damages to be determined in this new trial on the transcript, is limited to damages sustained by Plaintiff between July 9, 1973, and mid-August, 1973.

The Motion of Plaintiff to take a video-tape deposition and the Motion of Defendant to continue the hearing on that Motion are now moot.

Signed

APPENDIX "I"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 74-1657
SECTION "D"

GLEN R. HEMINGWAY, ET AL

VERSUS

OCHSNER CLINIC AND/OR OCHSNER FOUNDATION HOSPITAL, ET AL

JUDGMENT

The trial of this matter on the issue of damages as ordered by the Court on April 5, 1982, was, by agreement of the parties, submitted to this Court for determination, without a jury, and on the basis of the tesimony taken at the trial of this matter in December of 1981, and the documents introduced into evidence at that trial. The damages hereinafter awarded are limited to the damages sustained by Plaintiff between July 9, 1973, and mid-August, 1973, as per the findings of Judge Edward J. Boyle in the Order dated April 5, 1982.

After considering the transcript of the proceedings taken at the trial in December of 1981 and the documents introduced into evidence at that trial;

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of Plaintiff, Glen R. Hemingway, and against the Defendants, Ochsner Clinic and Ochsner Foundation Hospital, in the amount of

FIFTEEN THOUSAND AND NO/100 ($15,000.00) DOLLARS plus legal interest and costs of these proceedings.

New Orleans, Louisiana, this 20th day of December, 1982.

/S/ Signed

UNITED STATES DISTRICT JUDGE

APPENDIX "J"

Glen R. HEMINGWAY,
(Gretchen Hemingway, substituted as plaintiff-appellant for Glen R. Hemingway, deceased),

Plaintiff-Appellant Cross-Appellee,

v.

OCHSNER CLINIC and/or Ochsner Foundation Hospital,

Defendant-Appellee Cross-Appellant.

No. 83-3051

United States Court of Appeals,
Fifth Circuit.

Jan. 16, 1984.

Appeals were taken from an order of the United States District Court for the Eastern District of Louisiana, A.J. McNamara, Jr., which ordered a remittitur in a medical malpractice action. The Court of Appeals, Gee, Circuit Judge, held that trial court did not err in finding that the sole incident as to which the evidence submitted would, under Louisiana law, support jury finding of liability on part of certain physicians was the administration of Cafergot, a vasoconstrictant, on a date when physician knew or should have known that the patient was being treated for acute arterial insufficiency and trial court also did not err in determining that the period for which damages for that incident could be awarded covered only the next 36-odd days until date of his last treatment for his foot.

Affirmed.

See also, 5 Cir., 608 F.2d 1040.

Tschirn & Robin, John M. Robin, Darryl J. Tschirn, Covington, La., for plaintiff-appellant cross-appellee.

Adams & Reese, Henry B. Alsobrook, Jr., Jean M. Farquharson, New Orleans, La., for defendant-appellee cross-appellant.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GEE and GARWOOD, Circuit Judges, and EAST,* District Judge.

GEE, Circuit Judge:

On several occasions in 1973, doctors at Ochsner Hospital Clinic and Ochsner Foundation Hospital prescribed to Glen Hemingway the drug Cafergot, to which he became hypersensitive. He developed dramatic symptoms of hypersensitivity and was treated for these at Ochsner, but some time went by before doctors there realized that his problems were caused by the administration of Cafergot. After a protracted sequence of litigation, the jury found that certain physicians at Ochsner were negligent in their diagnosis and treatment of Mr. Hemingway and awarded him $365,000 damages. Reviewing the verdict and the damage award in light of Louisiana's standard of

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* District Judge of the District of Oregon, sitting by designation.

proof in malpractice actions, the trial court found that the evidence would support the jury verdict as to one specific incident and none other. He determined that the evidence of effects from this incident was limited to a 36-day period and ordered damages reduced to $15,000. Hemingway's widow[1] now appeals the remittitur, contending that the evidence presented justified the jury's award.

We find that the trial judge did not err in pinpointing the specific act that the jury could have found to constitute malpractice under Louisiana law, nor did he err in limiting the period for which the evidence supported finding injury from this act. Despite our sympathy for Mr. Hemingway's suffering, this court may not hold the hospital liable to him for negligence beyond that which he has proved according to the standard prescribed by law.[2]

Hemingway's Illness and Treatment

Glen Hemingway was first admitted to Ochsner Clinic in January of 1973, at which time he was diagnosed as suffering from pancreatitis.[3] Operations in January and in April removed his pancreas, rendering him an iatrogenic diabetic. After the operation, Hemingway was seen by Dr. Murison, an endocrinologist at Ochsner Foundation Hospital, for his diabetes.

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[1] Hemingway died during the pendency of this appeal.

[2] It is uncontested that Louisiana law applies to this diversity case.

[3] More facts of Hemingway's ailments and treatment at Ochsner are given in our previous opinion in this case, reported at 608 F.2d 1040, 1042-46 (1979). While the testimony quoted in that opinion comes from the first of the three jury trials in this case, the testimony of Dr. Murison quoted therein was submitted to the jury in this last trial by way of deposition since Dr. Murison was unavailable. Thus his earlier testimony, but none other, is properly part of the record on this appeal.

Hemingway also suffered from migraine headaches, which had plagued him since young manhood. He testified at trial that he had been taking Cafergot, a combination of caffeine and ergotamine, since December of 1971 to obtain relief from his severe migraine symptoms. Dr. Murison continued to prescribe Cafergot for Hemingway's migraine; Hemingway testified at trial that he was using over twelve Cafergot suppositories in two weeks.

Ergotamine is a vasoconstrictant; excessive intake can cause vascular insufficiency and gangrene of the extremities. Ergotamine can also cause gastrointestinal problems. The literature accompanying the drug—introduced into evidence—indicates that Cafergot is contraindicated for patients suffering from certain vascular problems, including hypersensitivity to any of its components and peripheral vascular disease.[4] Dr. Murison testified that diabetics are prone to develop vascular problems, although, he stated, such problems usually take some years to develop.

According to Hemingway's testimony at trial, on June 8th he had a diabetic crisis while moving his motorcycle in his garage and fainted, hitting his head and right arm when he fell. Later that day he developed a migraine headache and took Cafergot for relief. The next morning, his left foot was swollen and painful. On that day he renewed his prescription for Cafergot. Since his foot was worse on June 10th, he went to Ochsner Hospital emergency room where his foot was X-rayed and an Ace bandage applied. In the next few days the foot got progressively worse and Hemingway returned to Ochsner emergency room. On

[4] Dr. Murison, in his testimony, defined peripheral vascular disease as "a group of diseases in which there are problems dealing with the circulation in the extremities...."

the evening of June 16th, Dr. John Ochsner, a surgeon expert in the fields of cardiovascular and vascular surgery, was called in to treat Hemingway's circulatory problem. Dr. Ochsner testified that when he asked the patient what drugs he was taking Hemingway mentioned three medications but did not mention Cafergot. Dr. Ochsner testified that he does not personally review patients' records, but relies on his staff to consult with physicians on the staff of supervising physicians who have been treating the patient and to relay pertinent information to him. The medical records show that a physician on Dr. Ochsner's staff did consult with one on Dr. Murison's staff. Dr. Ochsner testified, however, that he was not made aware in June that Cafergot had been prescribed to Hemingway. When medication failed to dilate the blood vessels in the patient's foot, Dr. Ochsner performed a left lumbar sympathectomy, an operation in which nerves controlling the flow of blood to the leg are severed, allowing the blood to flow without restraint. In a few days the foot improved and Hemingway was discharged.

Hemingway returned to Ochsner on July 7th, suffering from the same symptoms: his left foot was swollen, cold and blue. The physician on Dr. Ochsner's staff who filled out the admission report noted "possible Buerger's disease,"[5] a condition for which Cafergot is specifically contraindicated. Dr. Ochsner's staff performed a continuous epidural block and administered medication to dilate the vessels, with moderate success. On July 9th, Hemingway suffered a migraine headache. Dr. Moseley, a member of Dr. Ochsner's staff, gave the patient a Cafergot suppository for the headache. Almost immediately thereafter, Hemingway's foot became blue again. When the doctors realized that Hemingway

[5] Buerger's disease is a severe circulatory disease in which blood clots in the limbs cut off circulation.

had received Cafergot just before the relapse, they diagnosed "ergotamine poisoning" as the cause of his lack of circulation in the left foot. Dr. Ochsner testified to the doctors' conclusions on July 9th:[6]

> "Q Oh, then you all knew then that this had to be a relationship between the foot condition and the Cafergot, is that correct?
>
> "A Correct.
>
> "Q Did you conclude at that time, Doctor, that there was a relationship between the foot condition and Cafergot back in June when you did the sympathectomy?
>
> "A Yes, yes."

Hemingway's condition was slowly remedied by continued use of the same medication previously administered to dilate the blood vessels.

Hemingway was discharged on July 14th. He returned to Ochsner Clinic two or three times later in July and August for follow-up treatment of his foot, the last date of such treatment being August 17, 1973. In early September, doctors at Ochsner became concerned that Hemingway had developed an addiction to the codeine that had been prescribed to him as a painkiller. Dr. Murison, Dr. McKinnon (who performed the pancreatectomy) and two other physicians at Ochsner reviewed Hemingway's record. The hospital record of their conference shows that they also discussed Hemingway's ergotamine sensitivity, as to

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[6] This testimony was given at the first trial in this case but affirmed by Dr. Ochsner at the instant trial.

which they came to the following conclusion: "The migraine problem is major since ergotamine sensitivity precludes use of this—which has helped patient in past but also conceivably could have played a role in starting the pancreatitis, i.e., its elements of [these three preceding words crossed out] vasculitis, as initiating this."[7]

Hemingway and his wife testified at this trial to continuing pain and swelling in his left leg and foot and his inability to lead a normal life or to have normal sexual relations. However, the only testimony introduced of the cause of Hemingway's problems after mid-August of 1973 was the expert testimony of Dr. Ochsner, who stated that he had examined Hemingway after September of 1973 and that, in his opinion, Hemingway's present problems were due to his diabetes and not in any way to his hypersensitivity to Cafergot.

The Posture of this Appeal

This case has been in court for nine and a half years. Hemingway originally filed suit against Doctors Murison and Ochsner and their staffs, Ochsner Hospital and Clinic, and their respective insurance firms on June 14, 1974. The case came to trial in early 1977. At the close of plaintiff's case, the trial court directed a verdict in favor of all defendants. On appeal, we reversed and remanded, *Hemingway v. Ochsner Clinic,* 608 F.2d 1040 (5th Cir.1979). Trial recommended in September of 1981, but after several days a mistrial was declared. Finally, in December 1981, the case was at last tried to a conclusion.

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[7] Vasculitis is a general term for inflammation of the blood vessels, which can be caused by a reaction to drugs.

The events of this last trial closely circumscribe our review. During trial, the court granted motions for directed verdict which removed from the jury's consideration the vicarious liability of the hospital and clinic based on the actions of any personnel except Drs. Ochsner and Murison, and doctors on their staffs. Before the case went to the jury, the parties stipulated that the hospital and clinic would be responsible for any negligence of physicians on Dr. Murison's or Dr. Ochsner's staffs. Also, the trial court granted defendants' motions for directed verdict as to future medical expenses, past wage loss, and future earning capacity.

The jury absolved Drs. Murison and Ochsner of liability but found that doctors on their staffs "negligently failed to follow the recognized standard of care in the diagnosis or treatment of Hemingway's condition" and that this negligence was a legal cause of injury to plaintiff. The jury awarded damages of $365,000 against the hospital and clinic, and the court entered judgment based on the jury verdict.

Defendants then filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. In April 1982, the court denied their motion for judgment n.o.v. and for a new trial on the issue of liability. The court ordered, however, that the damages award be set aside and a new trial held on damages unless the plaintiff filed a remittitur of all damages exceeding $15,000.

The court's order was based on its finding that the sole incident as to which the evidence submitted would, under Louisiana law, support the jury finding of liability on the part of physicians on Dr. Murison's or Dr. Ochsner's staffs was the administration of Cafergot by Dr. Moseley on July 9, 1973—while Hemingway was being treated for the second time for lack of circulation in his foot. Further, the court

found that since Hemingway had not produced evidence of injury from that administration of the drug after the date of his last treatment for his foot at Ochsner on August 17, 1973, the period for which damages for that incident could be awarded covered only those 36-odd days. Applying the standard of this circuit for review of damage awards, enunciated in *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir.1970), *modified*, 456 F.2d 180 (5th Cir.), *cert. denied*, 407 U.S. 921, 92 S.Ct. 2463, 32 L.Ed.2d 807 (1972), the trial court found that the maximum award which the evidence would support was $15,000.

Plaintiff refused to accept the remittitur and the case was set again for trial on the damages issue. At this time Judge Boyle, who had presided over the proceedings, took senior status; and the case was reassigned to Judge McNamara. At a status conference in December of 1982, Judge McNamara stated that in view of Judge Boyle's order the new trial on the damages issue would have to be confined to damages sustained between July 9th and mid-August of 1973. Feeling that appeals would be inevitable, the plaintiff agreed to submit the matter to the court on the previous record. On December 20th, Judge McNamara entered judgment for plaintiff in the amount of $15,000 limiting the damage period to the roughly 36 days specified by Judge Boyle. Plaintiff's subsequent motions to amend this judgment and motion for a new trial were denied by Judge McNamara. Both plaintiff and defendant now appeal.

Plaintiff argues that Judge Boyle erred in granting a conditional remittitur reducing the damage to $15,000 and that Judge McNamara erred in limiting the damage period in the new trial to the 36-odd days and in awarding only $15,000. Defendants appeal Judge Boyle's denial of their motion for judgment n.o.v. or for a new trial on liability.

Plaintiff's Failure of Proof

In *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665 (5th Cir.1974), this court set a strict standard for appellate review of a trial court's order of remittitur: The trial court will be reversed on the issue of whether any remittitur is proper only where the party opposed to the remittitur shows an abuse of discretion by the judge. *Id.* at 669.

> [A]n appellate court will find an abuse of discretion only when it appears that the jury's original verdict was *clearly within* the universe of possible awards which are supported by the evidence.... Once it has been determined that the trial court has not abused its discretion in demanding some remittitur, then the appellate court must determine whether the amount of the award which remains after the remittitur reflects the maximum award which the evidence will support or whether it merely represents the trial court's opinion of what the proper award should have been. At this point deference will be given to the trial court's determination since he, and not the appellate court, was present during the ebb and flow of the trial, and it will be presumed that the amount which he has chosen is the amount which will reduce the jury's verdict to the 'maximum possible' award unless the party opposed to the remittitur can point to credible evidence which would support a greater recovery.

Id. at 670 (emphasis in original). *Accord, Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir.1982), *cert. denied*, __ U.S. __, 103 S.Ct. 86, 74 L.Ed.2d 81 (1982). *Gorsalitz*, 429 F.2d at 1046 (Seventh Amendment prevents trial court from reducing jury verdict below the maximum award reasonably supported by the evidence).

Our own careful review of the extensive record in this case indicates that Judge Boyle did not abuse his discretion in ordering a remittitur and that his limitation of the award to $15,000 was proper. Despite the dramatic facts of this case, the liability defined by the parties, the jury verdict, and the evidence introduced—measured against the requirements of Louisiana law—do not permit a greater award.

It is important to grasp the restricted field in which liability could be found and damages awarded. First, the pretrial order limits the time during which the allegedly negligent acts took place to May through July of 1973. Second, the only actors found liable were unnamed physicians on the staffs of Drs. Murison and Ochsner: Drs. Murison and Ochsner themselves were exonerated by the jury; and the hospital and clinic, as entities, were excluded from liability by directed verdict.

Louisiana law takes a strict view of the evidence necessary to support a jury verdict in such cases as this. Under Louisiana Revised Statute 9:2794,[8] a plaintiff in a

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[8] L.R.S. 9:2794, passed in 1975, provides in relevant part:

> A In a malpractice action based on the negligence of a physician licensed under R.S. 37:1261 et seq. or a dentist licensed under R.S. 37:751 et seq., the plaintiff shall have the burden of proving:
>
> (1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians or dentists licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians or dentists within the involved medical specialty.

malpractice action must prove the relevant standard of care,[9] demonstrate that the defendant's conduct breached that standard, and show that it was the legal cause of plaintiff's injury. The Louisiana courts have interpreted the statute to require expert medical testimony to prove the standard of care and to prove that the defendant violated it. *Steinbach v. Barfield*, 428 So.2d 915, 919 (La.App.), *writ denied*, 435 So.2d 431 (1983).[10] Even where, as here, a

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(Footnote 8 continued)

> (2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill, and
>
> (3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.
>
> * * * * *
>
> C. In medical malpractice actions the jury shall be instructed that the plaintiff has the burden of proving, by a preponderance of the evidence, the negligence of the physician or dentist. The jury shall be further instructed that injury alone does not raise a presumption of the physician's or dentist's negligence. The provisions of this Section shall not apply to situations where the doctrine of res ipsa loquitur is found by the court to be applicable.

L.R.S. 9:2794 (West Supp.1983).

[9] If general practitioners are involved, plaintiff must prove a "local care" standard; if medical specialists are involved, a non-local standard may be proved. In the instant case, it is not necessary to determine which of these standards is appropriate, since the standard of care was proved by the testimony of Drs. Ochsner and Murison.

[10] Although neither party raises this issue, we note that we are not bound by the *Erie* doctrine to conform to the procedural rules of state law as to what sort of proof is required to make out a malpractice claim under the state statute. Nonetheless, we find that the "expert testimony" rule is so closely interrelated with the substantive cause of action of malpractice in Louisiana that federal courts sitting in diversity

hospital accepts respondeat superior liability for the actions of a doctor on its staff, the plaintiff must meet these requirements. *Bryant v. St. Paul Fire and Marine Insurance Co.*, 382 So.2d 234, 237 (La.App.1980). The doctrine of respondeat superior is based on the notion that the liability of the master depends on that of the servant; thus "the duty of care at issue is that of the servant [the doctor] and it must be proved that this duty was breached before the master can be held liable." *Id.*

We agree with Judge Boyle's pinpointing liability to the July 9th episode and to no other. He found that the evidence in the record would support a jury finding of liability under the Louisiana standard of proof as to the July 9th administration of Cafergot. Dr. Ochsner testified that a vasoconstrictant should not be given a patient being treated for acute arterial insufficiency. From the evidence introduced at trial, the jury could have concluded that a staff doctor gave Hemingway Cafergot, a vasoconstrictant, on July 9th, when he knew or should have known that the patient was being treated for acute arterial insufficiency. Dr. Ochsner's testimony and the medical records support the conclusion that Hemingway's severe and immediate reaction was caused by this administration of Cafergot.[11]

(Footnote 10 continued)
cases should apply the state rule in order to fully realize state substantive policy. *See Conway v. Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837, 838-39 (5th Cir.1976) (adopting state evidentiary rule to "give full effect" to Texas substantive policy in wrongful death actions); *E. L. Cheeney Co. v. Gates*, 346 F.2d 197, 206 (5th Cir.1965) ("As the Texas claim and the method of establishing it are so intertwined, we think the same ruling ought to be made by the federal court [on the procedural issue] whether it is bound by *Erie* or not.").

[11] Our affirmance of the trial court's determination of liability also disposes of defendants' challenge to the denial of their motions for judgment notwithstanding the verdict and for a new trial as to liability; we uphold the trial court's denial of both.

The trial court also held that the evidence would not support finding any other acts of the staff doctors negligent under the Louisiana standard. Our own evaluation of the medical evidence, against the yardstick of the Louisiana malpractice statute, confirms this assessment. Plaintiff's argument that the June sympathectomy would not have been necessary had doctors on Dr. Ochsner's staff informed him that Dr. Murison had been prescribing Cafergot to the patient is sheer speculation.

Judge Boyle also found that the latest date of evidence as to injury caused by this administration of Cafergot was in mid-August and limited the damage period accordingly. In this he was correct: while Mr. Hemingway testified that he was continuing to suffer pain in his left foot, the only evidence regarding the cause of that pain was that of Dr. Ochsner, who stated that these problems were due to Hemingway's diabetes and not to Cafergot. We find that Hemingway failed to adduce that "credible evidence" which would rebut the presumption in favor of the trial court's assessment of the "maximum possible" award.

The judgment below is

AFFIRMED.

APPENDIX "K"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3051

GLEN R. HEMINGWAY
(GRETCHEN HEMINGWAY, substituted as
plaintiff-appellant for GLEN R.
HEMINGWAY, deceased)

Plaintiff-Appellant Cross-Appellee,

versus

OCHSNER CLINIC and/or OCHSNER
FOUNDATION HOSPITAL,

Defendant-Appellee Cross Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion January 16, 1984, 5 Cir., 198__, __ F.2d __)

(February 17, 1984)

Before GEE and GARWOOD, Circuit Judges, and EAST*, District Judge.

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* District Judge of the District of Oregon, sitting by designation.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Signed
United States Circuit Judge